MISSISSIPPI LAW JOURNAL

Volume 80, Number 4

Summer 2011

CRIMINAL PROCEDURE DISCUSSION FORUM

UNIVERSITY OF AIX-MARSEILLE III, AIX-EN-PROVENCE, FRANCE

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** As of November 1, 2010*

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Manuscripts: Manuscripts should be submitted electronically to **misslj@olemiss.edu**. Manuscripts should be in 12-point type and double-spaced, in Microsoft Word, WordPerfect, or PDF. Citations should conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (18th ed. 2005).

Subscriptions: $35.00 per year. Single issue: $12.00. Subscriptions are renewed automatically upon expiration unless the subscriber sends a notice of termination.

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Mississippi Law Journal

Published by Students at
The University of Mississippi School of Law

VOLUME 80 Summer 2011 NUMBER 4

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INTRODUCTION

CRIMINAL PROCEDURE DISCUSSION FORUM

Russell L. Weaver[*] *& Sylvie Cimamonti*[**]

On June 10-11, 2010, the Fifth Criminal Procedure Discussion Forum was held at the University of Aix-Marseille III, Aix-en-Provence, France. LexisNexis, as well as a number of American universities (University of Windsor Faculty of Law (Canada), University of Mississippi School of Law's National Center for Justice and the Rule of Law, Washington & Lee University School of Law, Emory University School of Law, and University of Louisville Louis D. Brandeis School of Law) joined the University of Aix-Marseille III to co-host this event. The event attracted criminal procedure scholars from the Americas (both Canada and the U.S.), Europe (France, Germany and England), and the Pacific (Australia).

As with prior fora, this forum involved discussions on recent topics of great importance. For the 2010 forum, there were three topics: "Cyber-Issues" (including both cyber-procedure and cybercrime), "Terrorism and Procedure," and "Comparative Approaches to Plea Bargaining." The papers here are "discussion papers" that were submitted in advance of the forum and that served as the basis for the forum discussions.

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[*] Professor of Law & Distinguished University Scholar, University of Louisville, Louis D. Brandeis School of Law.

[**] Professor of Law, University of Aix-Marseille III (Aix, France).

CYBERCRIME ARTICLES

Cybercrime has assumed ever increasing importance in recent decades. The Internet is an extremely democratic technology in the sense that it can be accessed by virtually anyone, and the barriers to entry are quite low. An individual can communicate over the Internet using nothing more than a computer (or, for that matter, a handheld wireless device) and an Internet connection. Because of the ease of communication, the Internet has reshaped the world, spawning uprisings in the Middle East and toppling long-entrenched dictators. In the United States, groups like Moveon.org and the Tea Party are using the Internet to push their political agendas. At the same time, the Internet has been used as a tool for the commission of crime by child pornographers, swindlers (who hasn't received a solicitation from one of the Nigerian swindlers?) and others. The papers in this symposium probe different aspects of the cybercrime problem.

Professor Ronald J. Rychlak's *The Legal Answer to Cyber-Gambling*[1] discusses the problems associated with online gambling. He argues that federal efforts to regulate the online gambling industry have not been effective, and indeed have been counter-productive, and argues that legislators should move in a different direction.

Professor Dr. Dieter Dörr's *The Criminal Responsibility of Internet Service Providers in Germany* discusses the possibility of imposing criminal penalties on internet service providers (ISPs) for criminal matter posted on their servers.[2] He begins by noting that Internet communications can be both anonymous and global, thereby making it difficult or impossible to seek sanctions against the original poster of prohibited content. He then summarizes the distinctions that German law makes between the criminal responsibility of the person who posts illegal content and the responsibility of the ISP. Although the ISP can be held responsible for information posted by a third party, albeit with more limited liability, that liability is limited to ISPs who are aware that illegal content has been posted on their servers.

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[1] 80 MISS. L.J. 1229 (2011).

[2] 80 MISS. L.J. 1247 (2011).

Professor Russell L. Weaver's Brandenburg *and Incitement in a Digital Era*[3] discusses how the United States Supreme Court decision in *Brandenburg v. Ohio*[4] should be applied to online communications. The article notes that the *Brandenburg* test was developed during a quite different era when people communicated through oral and print media, and asks whether a new approach is required in an online era.

Professor Russell D. Covey's *Pervasive Surveillance and the Future of the Fourth Amendment*[5] analyzes how technological advances have affected individual privacy in the Fourth Amendment context. He suggests that the government's need to battle terrorism will encourage it to engage in ever more intrusive surveillance, and discusses the need to shift society's approach to the Fourth Amendment. In a similar view, Professor Luke M. Milligan's *Analogy Breakers: A Reality Check on Emerging Technologies*[6] suggests how analogies have not always proven effective or workable in this area of the law.

Finally, Professor Steven I. Friedland's *Post-*Miranda *Silence in the Wired Era: Reconstructing Real Time Silence in the Face of Police Questioning*[7] raises questions about how *Miranda v. Arizona*,[8] and its requirement that suspects invoke their right to remain silent, should apply in a modern digital era where response times are much quicker.

TERRORISM AND PROCEDURE

Terrorism and Procedure is an equally important topic, and it produced a number of papers at the forum. In a post-9/11 world, issues related to terrorism have assumed much greater importance, and have arisen in a variety of contexts. Professor Miiko Kumar's *Secret Witnesses, Secret Information*

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[3] 80 MISS. L.J. 1263 (2011).

[4] 395 U.S. 444 (1969).

[5] 80 MISS. L.J. 1289 (2011).

[6] 80 MISS. L.J. 1319 (2011).

[7] 80 MISS. L.J. 1339 (2011).

[8] 384 U.S. 436 (1966).

and Secret Evidence-Australia's Response to Terrorism[9] analyzes Australia's anti-terrorism legislation. In particular, she analyzes how Australia's use of anonymous witnesses and other secret evidence affects the "fundamental rights of open justice, fairness and confrontation."[10]

Professor Clive Walker's *Militant Speech About Terrorism in a Smart Militant Democracy*[11] discusses the tension between governmental attempts to deal with terrorism and a nation's obligation to respect fundamental values in the content of the crimes of incitement and solicitation. In particular, he questions the balance between legitimate prosecutions of "illegitimate propagation of violence" and legitimate speech.[12]

Professor Kent Roach's *Entrapment and Equality in Terrorism Prosecutions: A Comparative Examination of North American and European Approaches*[13] examines how the entrapment defense has been applied to terrorism prosecutions in both Europe and America. He suggests that courts are more likely to be deferential to police tactics in cases involving alleged terrorists, but he argues for judicial oversight designed to ensure that society does not target individuals based on their political or religious beliefs. He then analyzes the relative strengths of the competing tests applied by European and American courts.

Professor William Funk's *Electronic Surveillance of Terrorism in the United States*[14] analyzes the Foreign Intelligence Surveillance Act (FISA) and how FISA warrants differ from ordinary warrants. Rather than focusing on whether FISA is constitutional, Professor Funk focuses on the "struggle against international terrorism and the appropriate means to combat that terrorism consistent with retaining the individual freedoms citizens of developed nations have come to expect."[15]

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[9] 80 MISS. L.J. 1371 (2011).

[10] *Id.* at 1394.

[11] 80 MISS. L.J. 1395 (2011).

[12] *Id.* at 1453.

[13] 80 MISS. L.J. 1455 (2011).

[14] 80 MISS. L.J. 1491 (2011).

[15] *Id.* at 1503.

Professor Arnold H. Loewy's *Rethinking Search and Seizure in a Post-9/11 World*[16] discusses whether 9/11 explains a number of pro-government search and seizure decisions. He then goes on to examine the scope of rights that should be accorded to individuals in the airport context.

Professor Margareth Etienne's *Making Sense of the Ethnic Profiling Debate*[17] discusses how attitudes towards racial profiling changed following the 9/11 attacks on the World Trade Center. In her paper, she seeks to make sense of current debates regarding profiling in an attempt to clarify the true points of contention, and delineates areas where there may be overlap between those that disagree about the legitimacy of using profiling in relation to terrorists.

Professor Mark Kende's *The U.S. Supreme Court, the War on Terror, and the Need for Thick Constitutional Review*[18] discusses the problematic nature of this nation's prosecutions under the so-called "war on terror." Kende rejects the idea that alleged terrorists should be tried by military commissions, and argues that they should be tried by Article III federal judges at Guantanamo. He contends that these judges can employ well established criminal procedures and rules, unlike the ad hoc special commissions.

Professor Lawrence Rosenthal's *Those Who Can't, Teach: What the Legal Career of John Yoo Tells Us About Who Should Be Teaching Law*[19] analyzes Professor Yoo's work (while he worked as a Deputy Assistant Attorney General in the Department of Justice's Office of Legal Counsel) on the "torture memo" that he wrote regarding the federal anti-torture statute. After analyzing the deficiencies in Professor Yoo's analysis, Rosenthal questions whether Professor Yoo should be teaching students to practice law.

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[16] 80 MISS. L.J. 1507 (2011).

[17] 80 MISS. L.J. 1523 (2011).

[18] 80 MISS. L.J. 1539 (2011).

[19] 80 MISS. L.J. 1563 (2011).

PLEA BARGAINING

The third topic, and the final article, dealt with the subject of plea bargaining. Professor Ellen S. Podgor's *Pleading Blindly*[20] analyzes recent United States Department of Justice memos on plea bargaining. Even though she argues that DOJ deserves "applause" for its recognition of the need to take action regarding plea bargaining, she suggests that the memos fail to provide potential plea bargainers with critical information that might be obtained through discovery.

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[20] 80 MISS. L.J. 1633 (2011).

THE LEGAL ANSWER TO CYBER-GAMBLING

Ronald J. Rychlak[*]

INTRODUCTION

The first online gambling site opened in August 1995, and it is now estimated that there are over 2000 Internet gambling sites, offering various forms of gambling, including sports betting, casino games, lotteries, and bingo.[1] In 2009, gambling revenue for offshore companies was estimated to be $25.8 billion, with $5.4 billion coming from players in the United States.[2] Many observers believe that Internet gaming is well on its way to becoming a $100 billion-a-year industry.[3]

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[*] Mississippi Defense Lawyers Association Professor of Law and Associate Dean for Academic Affairs, University of Mississippi School of Law. This article builds on and updates a previous piece by the same author: Legal Problems with Online Gambling, 6 Engage: J. Federalist Soc'y Prac. Groups 36 (May 2005), *reprinted in* ORIN KERR, COMPUTER CRIME LAW 181 (Thomson West 2006).

[1] Am. Gaming Ass'n, *Industry Information, Fact Sheets: Industry Issues*, (2003), http://www.americangaming.org/Industry/factsheets/issues_detail.cfv?id=17. For a general overview of Internet gaming, see ROBERT M. JARVIS ET AL., GAMING LAW: CASES AND MATERIALS 563 (2003).

[2] Am. Gaming Ass'n, *supra* note 1. Poker Players' Alliance (PPA), a non-profit membership organization comprised of online and offline poker players, has a mission to establish favorable laws that provide poker players with a secure, safe and regulated place to play. The organization's top legislative priority is establishing federal regulation of Internet poker. Also, it is working at the state level to establish laws for poker (online and offline). PPA estimates that approximately ten to fifteen million Americans play Internet poker with some regularity. *See* Poker Players' Alliance Mission Statement, http://theppa.org/about/ (last visited Apr. 11, 2011).

[3] It was estimated that global revenues for Internet gaming were about $4.2 billion in 2003. *Unlawful Internet Gambling Funding Prohibition Act and the Internet Gambling Licensing and Regulation Commission Act: Hearing on H.R. 21 and H.R. 1223 Before the Subcomm. On Crime, Terrorism and Homeland Security, Comm. on the Judiciary*, 108th Cong. 8-12 (2003) (statement of John G. Malcolm, Deputy Asst. Att'y Gen., Criminal Div., U.S. Dept. of Justice), *available at* http://www.usdoj.gov/criminal/cybercrime/Malcolmtestimony42903.htm (discussing the feasibility and desirability of regulating Internet gambling) [hereinafter Malcolm]. By 2007, online poker by itself was a huge industry. Russell Goldman, *Online Poker Players Expose Alleged Fraud: Them's Cheatin' Electrons: Players Root Out Alleged Fraud at AbsolutePoker.com*, ABC NEWS, Oct. 19,

Online gaming is a major Internet enterprise and a serious matter for lawmakers.[4] Concern relates to the ability of minors to gamble online, fairness for online gamblers,[5] fraud by online operators and customers,[6] concern about compulsive gambling,[7] concern that Internet casinos will negatively affect state tax revenues by taking business away from brick-and-mortar casinos that pay taxes,[8] and more.[9] On the other hand, according to a study by the Poker Players Alliance, participating states could

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2007, http://abcnews.go.com/Technology/story?id=3752500&page=1 (referring to "the $9 billion to $12 billion online poker industry . . . .")

[4] *See News You Can Use: Harvard Study Touts Online Gambling Regs*, CYBERCRIME NEWSL., Jan.-Feb. 2010, at 12, *available at* http://www.olemiss.edu/depts/ncjrl/pdf/January-February%202010%20Cybercrime%20e-Newsletter.pdf; Alexandra Lages, *Cybercrime Expert: Macau Should Observe Illegal Online Gambling*, MACAU DAILY TIMES, Apr. 9, 2010, *available at* www.macaudailytimes.com.mo/macau/10926-Cybercrime-expert-Macau-should-observe-illegal-online-gambling.html.

[5] *See* Goldman, *supra* note 3 (discussing a scheme by which a part-owner and former executive of a poker web site cheated by looking at other players' digital cards). Internet casino operators have also failed to pay winning customers. *See* Beau Thompson, *Internet Gambling*, 2 N.C. J.L. & TECH. 81, 88 (2001).

[6] *See* John L. McMullan & David C. Perrier, *Controlling Cyber-Crime and Gambling: Problems and Paradoxes in the Mediation of Law and Criminal Organization*, 8 POLICE PRAC. & RES. 431 (2007) (examining a cyber-crime scheme that defrauded electronic gambling machines in Canada).

[7] Video gambling's addictive nature has been compared to crack cocaine. *Gambling Fever Burns up Bills, Then Lives, and 'It Happens So Fast'*, COM. APPEAL (Memphis), Apr. 4, 1994, at A1 (citing Jim Jongewaard, director of recovery programs for chemical dependency and compulsive gambling at the Memphis Psychological Center); *see also* Ronald J. Rychlak, *Video Gambling Devices*, 37 UCLA L. REV. 555 (1990).

[8] States also fear that Internet casinos will be taxed at the federal level, cutting into their revenues. *See* Sewell Chan, *Congress Rethinks Its Ban on Internet Gambling*, N.Y. TIMES, July 28, 2010, at A1 ("With pressure mounting on the federal government to find new revenues, Congress is considering legalizing, and taxing, an activity it banned just four years ago: Internet gambling.").

[9] This includes misusing financial data or the identity of the user. *See* Malcolm, *supra* note 3 ("[T]he potential for fraud connected with casinos and bookmaking operations in the virtual world is far greater than in the physical realm. On-line casinos and bookmaking establishments operate in many countries where effective regulation and law enforcement is minimal or non-existent."). For a general discussion of the problems associated with the legalization of gambling, see Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 MISS. L.J. 291 (1995); Ronald J. Rychlak, *Lotteries, Revenue, and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. Rev. 11 (1992).

raise $3.1 billion in annual tax revenue by permitting, regulating, and taxing Internet gambling sites.[10]

These concerns about Internet gaming do not translate easily into action. When it comes to regulation or prohibition, there are two basic lines of thought. One line holds that Internet gambling cannot be entirely stopped, so it has to be regulated.[11] The opposing argument is that it cannot be regulated, so it must be prohibited.[12] Unfortunately, both groups are partially correct: Internet gaming is very difficult to regulate or to prohibit.

In 2009, federal legislation went into place that essentially prohibited online gambling by prohibiting American financial institutions from facilitating cash transfers to and from Internet gambling sites. Unfortunately, due to jurisdictional limitations and the creativity of gaming operators, this new law is unlikely to meet the needs of American lawmakers. In fact, most of the attempts to prohibit or regulate Internet gambling have failed, and—by the very nature of the industry—are doomed to fail. This paper, however, proposes a market-based solution that provides gamblers with a fair game, reduces social costs of online gambling, and provides gaming operators, both from within and outside of this nation, the ability to run a well-regulated online business. Legal, unregulated web pages will still be available, but regulated sites will provide competition that may run most crooked operations out of business.

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[10] Justin Berton, *Online Poker Players Face New Prohibition*, S.F. CHRON. Aug. 27, 2006, at A1, *available at* http://sfgate.com/cgi-bin/article.cgi?f=/c/a//2006/08/27/POKER.TMP.

[11] *See generally* Adrian Parke & Mark Griffiths, *Why Internet Gambling Prohibition Will Ultimately Fail*, 8 GAMING L. REV. 295, 298 (2004) ("From the U.S. experience, regulating prohibition of Internet gambling effectively is unfeasible."). "Given the unfeasibility of a blanket ban . . . focus should be redirected onto developing Internet gambling regulation." *Id.*

[12] Senator Jon Kyl (R-AZ) summed up how he felt about Internet gambling in an interview when he said, "I don't believe it can be regulated, so we have to prohibit it." Steven Crist, *All Bets Are Off*, SPORTS ILLUSTRATED, Jan. 26, 1998, at 82, *available at* http://sportsillustrated.cnn.com/vault/article/magazine/MAG1011843/index.htm.

I. REGULATING INTERNET GAMBLING WITH GENERAL ANTI-GAMBLING LAWS

Today, some form of gambling is legal in all but two states (Hawaii and Utah). Internet gambling, on the other hand, is illegal in all fifty states.[13] Of course, many nations around the world have legalized, regulated, and taxed Internet gambling.[14] Since web pages do not recognize international borders, a gaming site operated in any nation can attract gamblers from every other nation.[15] A large percentage of Internet gamblers are from the United States,[16] and that is a serious concern, because it means that Americans are subject to all of the negative social consequences of online gambling without receiving any of the revenue benefits.

As a result of American laws, the island nation of Antigua—which has legalized online gambling—presented charges against the United States to the World Trade Organization (WTO).[17] The General Agreement on Trade in Services (GATS) is a treaty of the WTO that entered into force in January 1995. It provides that: "With respect to market access . . . each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule."[18] Thus, in terms of market access, member countries must treat businesses from other member countries similarly to how they treat domestic businesses. According to Antigua, allowing American horse race operators to take bets on distant races, but prohibiting Antiguan gambling operations from taking remote bets, violates this "market access" limitation.

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[13] U.S GEN. ACCOUNTING OFFICE, INTERIM REPORT ON INTERNET GAMBLING, GAO-03-89 (2002). *available at* http://www.gao.gov/new.items/d021101r.pdf. Such is not to say that states are uninterested in online gambling. *See, e.g.,* Robert W. Stocker II, *State Legislatures Consider Legalizing Intrastate Internet Gaming*, EUR. GAMING LAW., Spring 2010, at 16; Martin D. Owens, Jr., *A Few Notes on California's Latest Bid to Legalize Internet Poker*, 14 GAMING L. REV. 463 (2010).

[14] Antigua, Australia, Austria, Belgium, Curacao, Germany, Great Britain, and South Africa all license some form of online gambling operations. Australia has regulated and taxed online gaming since 1997, and the United Kingdom followed suit in 2005. Joseph J. McBurney, Note, *To Regulate or To Prohibit: An Analysis of the Internet Gambling Industry and the Need for a Decision on the Industry's Future in the United States*, 21 CONN. J. INT'L L. 337, 357 (2006) (noting history of gambling in United Kingdom). The United Kingdom uses special age verification software, records all bets, places caps on wagers, and makes the sites subject to routine audits for fraud and money laundering. It has become a haven for the largest Internet gaming companies in the world, some of which are traded on the London Stock Exchange. *See* Nicholas M. Wajda, Note, *Over-Playing a Weak Hand: Why Giving Individual States a Choice is a Better Bet for Internet Gambling in the United States*, 29 T. JEFFERSON L. REV. 313, 326-27 n.96 (2007).

[15] *See* Ronald J. Rychlak, *Compassion, Hatred, and Free Expression*, 27 MISS. C. L. REV. 407, 423-26 (2008) (discussing the 2004 meeting of the Organization for Security and Cooperation in Europe (OSCE) concerning Internet hate speech); *Governing the Internet: Freedom and Regulation in the OSCE Region* (Christian Möller & Arnaud Amouroux eds., 2007).

[16] *See* Sue Schneider, *The Market: An Introduction, in* INTERNET GAMBLING REPORT V: AN EVOLVING CONFLICT BETWEEN TECHNOLOGY, POLICY, AND LAW 47, 48 (Mark Balestra & Anthony Cabot eds., 2002); Parke & Griffiths, *supra* note 11, at 295 (stating that fifty to seventy percent of the Internet gamblers worldwide are from the United States).

A WTO panel found in favor of Antigua, holding that the Wire Act, among other laws, was inconsistent with the United States' obligation to provide goods and services "no less favorable" than those the United States afforded its own citizens.[19] While the final Appellate Body of the WTO agreed that the American laws were necessary to protect public morals, the Appellate Body also said the United States was still in violation of its obligations because it continued to allow domestic businesses to engage in interstate betting on horseracing via the Interstate Horseracing Act (IHA) and was, therefore, acting in a discriminatory manner.[20]

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[17] *See* Request for Consultations, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/1 (Mar. 27, 2003), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm (listing federal and state statutes Antigua identified as barriers to trade). In all, Antigua cited over two hundred laws, statutes, codes, and cases allegedly in conflict with United States' obligations under GATS. *See* Summary of the Dispute, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 28, WT/DS285 (Feb. 24, 2010), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds285 sum_e.pdf.

[18] *See First Submission of Antigua and Barbuda, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 180, WT/DS285 (Oct. 1, 2003), *available at* http://www.antigua-barbuda.com/business_politics/pdf/Antigua_Submission.pdf.

[19] The United States asserted that these federal laws were necessary to protect public order and morals because online gambling carries increased threats of use by minors, money laundering, and organized crime. *See* Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, ¶ 6.521 (Nov. 10, 2004). Antigua countered that gambling was a significant component of the United States economy and currently available in various forms in forty-eight states. *Id.* at ¶¶ 3.8-3.9.

[20] *See* McBurney, *supra* note 14, at 361.

Gambling, of course, has traditionally been seen as a vice.[21] Legalized gambling often comes with adverse social consequences,[22] and in the United States it has a history associated with organized crime. As states have moved toward legalization, they have instituted strict regulatory schemes designed to minimize adverse social consequences while keeping the games fair and the ownership honest. With Internet gaming, however, this has proved quite difficult. "One of the most heavily regulated industries in the world has crashed with full force into one of the most unregulated, and inherently unregulatable, phenomenon of modern times."[23]

Since many Internet gaming pages are sanctioned by foreign governments, one possibility is simply to rely upon the regulatory authority provided by those nations. An obvious problem with that solution is that regulation in another nation may not protect American gamblers.[24] More importantly, many (but not all) of the sanctioned virtual casinos are located in small, island nations that provide virtually no actual regulation; they just charge a fee.[25]

Consider:

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[21] Historically, states treated gambling as *malum in se*. I. NELSON ROSE & MARTIN D. OWENS, JR., INTERNET GAMING LAW: GAMBLING AND THE LAW 101 (2005) (describing gambling as "a wicked traffic that should be prevented").

[22] *See* Maura J. Casey, *Gambling with Lives*, FIRST THINGS, Nov. 2009, at 37, *available at* http://www.firstthings.com/article/2009/10/gambling-with-lives.

[23] Jeff German, *Fed Panel Focuses on Internet*, LAS VEGAS SUN, May 22, 1998 (quoting Wisconsin Assistant Attorney General Alan Kesner's testimony before the National Gambling Impact Study Commission).

[24] The Council of Ministers of the Isle of Man has marketed that jurisdiction as one that does not place any restrictions on the acceptance of wagers from U.S. residents. *Isle of Man Reconfirms its Commitment to Developing as a Well Regulated Tier One Online Gaming Jurisdiction*, Jan. 4, 2005, *available at* http://www.gov.im/ipa?ViewNews.gov?page=lib/news/ebusiness/isleofmanreconfi.xml&menuid=11570.

[25] Nearly thirty percent of Internet gambling web sites claim to hold licenses from either Antigua or Curacao. U. S. GEN. ACCOUNTING OFFICE, *supra* note 13, at 52 (2002); *see also* Christopher J. Murphy, *Online Bookmaking and Gaming in the Isle of Man*, 6 GAMING L. REV. 89, 93-94 (2002); Roger A. Petersen, *Internet Gaming in Costa Rica*, 5 GAMING L. REV. 89, 96-97 (2001) (there is no specific legislation authorizing Internet gaming in Costa Rica but the authorities have not enforced the existing anti-gambling laws against online casinos); Jeff Dense, *The Socioeconomic Impact of Gaming in the Virgin Islands*, 8 GAMING L. REV. 175 (2004) (discussing how the Virgin Islands enacted legislation to legalize Internet gaming, but U.S. law has hampered development of the industry).

> In Nevada and New Jersey the applicant for an unrestricted gaming license can expect the process to take one to two years. The applicant has the burden of proving to the licensing authorities that it is legitimate and has the necessary skills available to operate a casino in compliance with the law. The applicant must pay the costs of the independent investigation undertaken to test the accuracy and complete truthfulness of its responses to the myriad questions answered in filling out the application. These costs routinely amount to between $500,000 and $1,000,000. There are public hearings to delve into personal and business transgressions admitted in the application or turned up in the investigation. These amounts do not take into consideration the legal fees that each applicant incurs in getting help and advice in connection with the process.[26]

In contrast, most of the off-shore nations that license Internet casinos charge between $8000 and $20,000, and the time to obtain the license is between one and five weeks.[27] Obviously, these other nations do not devote as much time and effort to gaming regulation as is expected in the United States. As such, reliance on the laws of other nations will not meet the needs of American lawmakers.[28]

Another alternative would be to rely upon state law. Since gambling has traditionally been a matter of state concern, some individual states have already taken action to try to stop Internet gambling. In 2001, for instance, New Jersey's Attorney General filed civil suits against three offshore casinos.[29] This is in line with similar actions taken by officials in New York, Minnesota, and

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[26] Chuck Humphrey, *Licensing Online Gambling by Foreign Countries*, http://www.gambling-law-us.com/Articles-Notes/online-licensing.htm (last visited Apr. 11, 2011).

[27] *Id.* This comparison does not even take into consideration the difference in taxes and fees that are charged and used to fund ongoing regulation.

[28] This analysis could shift in the future, as Great Britain and other European nations assume a larger role in regulating Internet gambling. *See* Mike Brunker, *Britain Embraces Internet Gambling*, MSNBC.com, Mar. 7, 2001, http://msnbc.com/id/3071035/.

[29] *See* N.J. Dep't of Law & Pub. Safety, *Attorney General Announces Civil Action Against Three Internet Casinos* (June 18, 2001), *available at* http://www.state.nj.us/ lps/ca/ press/casinos.htm; N.J. Dep't of Law & Pub. Safety, *Attorney General Announces Civil Action Against Internet Sports Betting Operations* (Oct. 16, 2001), *available at* http://www.state.nj.us/lps/ge/2001news/sportsbet.htm.

Missouri.[30] In Florida, the Attorney General distributed "cease and desist" letters to at least ten media companies providing publishing or broadcasting advertisements for offshore computer gambling sites.[31]

The Attorneys General of Florida, Indiana, Minnesota, and Texas have all issued opinions specifically declaring Internet gambling illegal under the laws of their respective states,[32] and other states have put new legislation in place.[33] Enforcement actions, however, are very difficult to bring. The Internet casino operations are usually located beyond the state's jurisdictional limits,[34] and even if the necessary evidence could be uncovered, prosecutors are unlikely to go after individual gamblers. As such, states have been unable to significantly impact online betting.[35]

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[30] *See, e.g.*, People v. World Interactive Gaming Corp., 714 N.Y.S.2d 844, 852 (N.Y. Sup. Ct. 1999); State v. Granite Gate Resorts, Inc., 568 N.W.2d 715 (Minn. Ct. App. 1997); State v. Interactive Gaming Commc'ns Corp., No. CV97-7808, 1997 WL 33545763 (Mo. Cir. May 23, 1997).

[31] This action prompted many Florida companies to scale back their operations, move from Florida, or get out of the business all together. Lawrence G. Walters, *The Law of Online Gambling in the United States-A Safe Bet, or Risky Business?* 7 GAMING L. REV. 445 (2003).

[32] 95 Op. Fla. Att'y Gen. 70 (1995); 98 Op. Ind. Att'y Gen. 5 (1998); 96 Op. Kan. Att'y Gen. 31 (1996); 95 Op. Tx. Att'y Gen DM-344 (1995).

[33] *See* Kelly B. Kramer, *A New Front in the Battle Against Internet Gaming?* 6 GAMING L. REV. 21 (2002).

[34] Though some states have claimed jurisdiction over any Internet site that is accessible from within that state. *See* Michael J. Dunne & Anna L. Musacchio, *Jurisdiction Over the Internet*, 54 BUS. LAW, 385 (1998); Millennium Enters. Inc. v. Millennium Music, LP, 33 F. Supp. 2d 907 (D. Ore. 1999) (discussing numerous cases on the subject).

[35] In 2002, the New York Attorney General took action against online casinos by suing Citibank and PayPal for facilitating them. Citibank ultimately paid $100,000 in costs and $400,000 to groups providing counseling to recovering problem gamblers. Joseph M. Kelly, *Payment Problems and New Solutions: From National Regulation to Global Solutions,* 7 GAMING L. REV. 123, 125 (2003). It also agreed to "block and decline authorizations for bankcard transactions . . . consistent with, and pursuant to, then-standard Visa and MasterCard rules and procedures for posting to bankcard accounts that are marketed to consumers in the United States. . . ." Citibank, *Assurance of Discontinuance* (June 21, 2002), ¶ 18, *cited in* Kelly, at 125 [hereinafter Citibank AOD]. The settlement agreement also provided "that a cardmember's use of a general purpose credit card in connection with gambling . . . does not mean that the credit card issuer is involved in gambling or promotion of gambling." *Id.* at ¶ 21. Additionally, part of the agreement stated that a consumer's use of a "credit card [for Internet gambling] cannot be deemed the promotion or facilitation of gambling. . . ." *Id.* at ¶ 22.

The New York Attorney General also reached a settlement with the money transfer service, PayPal, Inc. "In its prospectus filed with the SEC on June 28, 2002, PayPal [acknowledged]: 'Some online casinos use our product to accept and make payments. If

Federal law has its own problems.[36] The U.S. Department of Justice (DOJ) has taken the position that Internet gambling is illegal under at least four older federal statutes: the Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises Act (otherwise known as the Travel Act);[37] the Professional and Amateur Sports Protection Act;[38] the Interstate Transportation of Wagering Paraphernalia Act;[39] and the Wire Act.[40] Enforcement under these laws, however, has proved quite difficult.

The Wire Act, the primary federal law purportedly applicable to Internet gaming, makes it a crime for anyone "being engaged in the business of betting or wagering [to] knowingly use[] a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest . . . ."[41] The DOJ has taken the position that the Wire Act includes online gaming, even though the Act was enacted prior to the invention of the Internet.[42]

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these casinos are operating illegally, we may be subject to criminal prosecution for numerous laws, including but not limited to money laundering laws'." PayPal, *Assurance of Discontinuance*, ¶ 9, *cited in* Kelly, at 125-26 [hereinafter PayPal AOD]. This agreement provided that PayPal would "cease processing any payments for online gambling merchants, where such payments involve PayPal's New York customers." *Id.* at ¶ 20, *cited in* Kelly, at 125. PayPal paid $200,000 in costs, penalties, and disgorgement of online gaming profits. *Id.* at ¶ 23.

Most recently, Gov. Steve Beshear of Kentucky filed suit under state law against Pocket Kings, operator of Full Tilt Poker, for all the money lost by Kentucky online poker players, times three. *See* I. Nelson Rose, *Kentucky Sues to Recover Poker Losses*, GAMBLING & L., no. 2010-3 (suggesting that "Gov. Beshear's next suits will be against the Kentucky State Lottery and the Kentucky Derby"), *available at* http://www.gamblingandthelaw.com/columns/282-kentucky-sues-to-recover-poker-losses.html.

[36] Gaming is normally a matter for state control, but international Internet gambling transactions are subject to federal laws because under the Commerce Clause of the Constitution, Congress has power to regulate commerce with other nations. Parke & Griffiths, *supra* note 11, at 296.

[37] 18 U.S.C. § 1952 (2006).

[38] 28 U.S.C. § 3702 (2006). *See* Ronald J. Rychlak, *A Bad Bet: Criminalizing Nevada's College Sports Books*, 4 NEV. L.J. 320 (2004).

[39] 18 U.S.C. § 1953 (2006).

[40] *Id.* at § 1084 (2006).

[41] *Id.*

[42] *See generally* U.S. GEN. ACCOUNTING OFFICE, *supra* note 13 (stating that based on information provided by the DOJ, the Wire Act applies to online gaming). The most obvious

In 2002, the Second Circuit in *United States v. Cohen* held that the Wire Act did apply to Internet gaming involving sports bets.[43] However, the court did not address whether the Wire Act would have applied had the bet been made on something other than a "sporting event or contest." The Fifth Circuit answered this question in *In re MasterCard International Inc.*[44] That court held that "the Wire Act's prohibition of gambling activities is restricted to the types of events enumerated in the statute, sporting events or contests."[45] Therefore, neither the Second nor the Fifth Circuit agrees with the DOJ's view that the Wire Act applies universally to online gambling. Although the DOJ is steadfast in its contention that federal law prohibits online gambling, the DOJ has never completed a successful contested Wire Act prosecution against a non-sports Internet wagering operator, and all highly publicized extraditions to and/or arrests of individuals in the United States were directly related to sports-betting prosecutions. This is because the federal legislation in place for years was aimed at prohibiting sports gambling instead of the more expansive Internet gaming.[46]

II. INTERNET SPECIFIC LEGISLATION

The first attempt specifically to address Internet gaming was offered in 1996 by Senator Jon Kyl when he proposed the Internet

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observation is that the Wire Act expressly applies to wire, not wireless, betting. *See* Pearson Liddell, Jr. et al., *Internet Gambling: On a Roll?* 28 SETON HALL LEGIS. J. 315, 321-22 (2004).

[43] 260 F.3d 68 (2d Cir. 2001).

[44] 313 F.3d 257 (5th Cir. 2002), *aff'g* 132 F. Supp. 2d 468 (E.D. La. 2001).

[45] 132 F. Supp. 2d at 481.

[46] In July 2006, David Carruthers, the chief executive of BetOnSports, a major online sports-betting operation that was publicly traded in the United Kingdom, was arrested at Dallas/Fort Worth International Airport as he waited to board a flight to Costa Rica, where the company had a major operation. Carruthers, a British citizen, was indicted along with ten others on racketeering and conspiracy charges in a twenty-two-count indictment unsealed by federal prosecutors in St. Louis. The government said BetOnSports fraudulently took bets from U.S. residents by phone and the Internet and failed to pay excise taxes. According to news reports, Clive Hawkswood, the chief executive of the Remote Gambling Association, said, "If the U.S. is engaged in a clampdown then it's very serious because it's half the world's market." *See* Ronald J. Rychlak, *Against the Odds: Smart Money Won't Bet on the Feds' Latest Push to Stop Internet Gambling*, LEGAL TIMES, Aug. 31, 2006.

Gambling Prohibition Act (IGPA).[47] The IGPA failed to pass in 1997 and 1998 and again in 1999 and 2000 after several amendments.[48] The next attempt was the Unlawful Internet Gambling Funding Prohibition (UIGFP), introduced by Representatives Jim Leach and John La Falce.[49] The UIGFP failed to become law in 2001 and 2002.[50] An updated UIGFP again failed in 2003.[51]

After the many unsuccessful attempts to pass legislation dealing with online gaming, legislators seized a last-minute opportunity in late 2006 and attached the Unlawful Internet Gambling Enforcement Act (UIGEA) onto Title VII of the Safe Port Act.[52] The aim of UIGEA was to fill in any gaps in previously existing federal laws that apply to Internet gaming.[53] The

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[47] *See* Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. (1997); *see also* McBurney, *supra* note 14, at 348 (discussing failed legislative proposals to prohibit, and later to regulate, the Internet gaming industry prior to the UIGEA).

[48] McBurney, *supra* note 14, at 348-49; *see also* Benjamin C. Wickert, *All In, But Left Out: How the Unlawful Internet Gambling Enforcement Act Seeks to Eradicate Online Gambling in the United States*, 10 VAND. J. ENT. & TECH. L. 215, 223 (2007) (discussing the limitations of the Wire Act that the IGPA sought to rectify).

[49] H.R. 556, 107th Cong. (2001).

[50] *See* McBurney, *supra* note 14, at 348-49.

[51] *Id.*; *see also* James N. Brenner, *Betting on Success: Can the Unlawful Internet Gambling Enforcement Act Help the United States Achieve Its Internet Gambling Policy Goals?* 30 HASTINGS COMM. & ENT. L.J. 109, 121 (2007).

[52] UIGEA went into effect January 19, 2009, but financial institutions were not required to comply until December 1, 2009. Prohibition on Funding of Unlawful Internet Gambling, 73 Fed. Reg. 69,382, 69,382 (Nov. 18, 2008) (to be codified at 31 C.F.R. pt. 132). *See* I. Nelson Rose, *Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, 10 GAMING L. REV. 537, 537 (2006) (describing the structure of UIGEA and SAFE Port Act); Wajda, *supra* note 14, at 323.

[53] Wajda, *supra* note 14, at 325 (noting that UIGEA supplements the previously existing framework of federal law). Title VIII of the UIGEA, found at 31 U.S.C. §§ 5361–5367 "prohibits gambling businesses from knowingly accepting payments in connection with the participation of another person in a bet or wager that involves the use of the Internet and that is unlawful under any federal or state law." The regulation requires compliance in four general areas: (1) screening commercial customers at account opening, (2) policies and procedures to block prohibited transactions conducted via debit and credit cards, (3) policies and procedures to follow when a commercial account processes restricted transactions, and (4) new notice requirements for commercial customers. The Act did not determine the difference between illegal and legal gambling. Needless to say, it is difficult for banks to stop payments for something that does not have a definition. The regulation drafters acknowledged this difficulty when they noted that they could not create a list of Internet gambling businesses for banks to block payments to and from.

Recognizing that it would not be practical to require banks from blocking payments they could not identify as unlawful, the final rule focuses on preventing unlawful Internet legislation focused on financial transactions, prohibiting any "person engaged in the business of betting or wagering" from accepting credit, including credit funded by a credit card, an electronic fund transfer, any check or draft, or the proceeds of any other form of financial institution.[54]

UIGEA gives the Secretary of the Board of Governors of the Federal Reserve System, in consultation with the Attorney General, the authority to proscribe regulations requiring payment systems to identify and prevent the payment of money for unlawful transactions, like Internet gambling.[55] UIGEA also prohibits "a financial transaction provider, or any interactive computer service or telecommunications service" from owning or operating any website at which unlawful bets or wagers may be placed, if such person has actual knowledge and control of bets and wagers.[56] The Act provides both civil remedies and criminal penalties for those found in violation.[57] In essence, UIGEA places the burden of stopping illegal Internet gambling on credit card companies.

UIGEA has an exception for intrastate Internet gambling, which allows states individually to permit Internet gambling, but only if the betting action is contained within the borders of that state. For example, if Mississippi and Alabama were each to legalize Internet gambling, residents of those states would be able to place bets online, but only in their respective states. The provisions of the UGIEA would not allow any attempt by the Alabama resident to place a bet with a Mississippi Internet casino or vice versa even if the type of activity were legal in both states. In contrast, the Interstate Horseracing Act (IHA) permits

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gambling businesses from benefitting from the payment system by denying them the opportunity to open bank accounts from which to receive payments. Banks are not required to monitor payments in or out of their bank to determine if they are financing lawful or unlawful Internet wagers, nor are they required to re-investigate the business models of existing commercial customers to assess their likelihood of accepting online wagers. They are not required to have written policies and procedures to block Automated Clearing House, check, or wire payments related to Internet gambling. This indirect approach of requiring additional screening of commercial customers opening bank accounts is deemed by the regulation's drafters to meet the UIGEA's requirements.

[54] 31 U.S.C. § 5363 (1)-(4) (2006).

[55] § 5364.

[56] § 5367.

[57] §§ 5365-66.

interstate bets via phone or "other electronic media" as long as the bet is "lawful in each State involved."[58]

III. PROBLEMS WITH UIGEA

Many weaknesses have been recognized in UIGEA since its passage. It was rushed through Congress a mere thirty-two minutes before Congress adjourned for fall recess as part of the Safe Port Act.[59] This was essentially an anti-terrorism bill designed to protect United States' ports from cargo ships carrying hazardous materials. Despite the fact that lawmakers had virtually no time to read the bill, it passed by a nearly unanimous vote because voting against it would have been the equivalent of voting against the anti-terrorism bill.[60] "According to Senator Frank R. Lautenberg (D-NJ), no one on the Senate-House Conference Committee had even seen the final language of the bill."[61] Representative Barney Frank (D-Mass.), who later introduced his own pro-Internet gaming legislation,[62] stated that "[t]his midnight rulemaking will tie the hands of the new administration, burden the financial services industry at a time of economic crisis, and contradict the stated intent of the Financial Services Committee."[63]

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[58] 15 U.S.C. § 3002(3) (2006).

[59] Wajda, *supra* note 14, at 323-24 (explaining that Congress approved the Safe Port Act during the final minutes of the final session before the election period recess); *see also* George F. Will, *Prohibition II: Good Grief; When Government Restricts Americans' Choices, Ostensibly for Their Own Good, Someone is Going to Profit from the Paternalism*, NEWSWEEK, Oct. 23, 2006, at 78.

[60] I. Nelson Rose, *Enforcing a Stupid Law*, 12 GAMING L. REV. & ECON. 547, 547 (2008).

[61] Rose, *supra* note 52.

[62] *See* Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2267, 111th Cong. (2009). Sponsored by Rep. Barney Frank (D-MA), this legislation is intended to

> establish a federal regulatory and enforcement framework under which Internet gambling operators could obtain licenses authorizing them to accept bets and wagers from individuals in the U.S., on the condition that they maintain effective protections against underage gambling, compulsive gambling, money laundering and fraud, and enforce prohibitions or restrictions on types of gambling prohibited by States, and Indian Tribes.

H.R. REP. NO. 111–656, pt. 1, at 20 (2010).

[63] *Bush Moves to Finalize Internet Gambling Regulations*, USA TODAY, Nov. 12, 2008, http://www.usatoday.com/news/washington/2008-11-12-Internet- gambling_N.htm. Since he assumed the position as chairman of the House Financial Services Committee in 2007, Rep.

UIGEA was designed to prevent United States financial institutions from providing monetary transfers to online gambling operations.[64] Banks have characterized it as "an unfunded mandate," because the federal government requires financial institutions to undertake the burden without any reimbursement.[65] The recordkeeping duty alone may total approximately one million hours.[66] In an effort to alleviate this pressure, Congress created a no-fault provision that excuses financial institutions if they block a legitimate transaction by mistake.[67] Unfortunately, this may lead financial institutions to be overly conservative and err on the safe side by blocking many legitimate transactions.

Another problem with UIGEA relates to its jurisdictional limits. Most online gambling businesses are located overseas and operated by foreign companies that are outside the reach of United States laws. "[H]istory has shown that trying to enforce domestic laws on foreign website operators is virtually impossible."[68] Nations that license these operators are unlikely to

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Frank has introduced five bills aiming to legalize and license Internet gambling. Through a regulation and licensing program he hopes to bring the online gambling industry under the purview of the federal government. This would, he believes, reduce related criminal activity, ensure the fairness of online gaming, and generate jobs and tax revenue. *See generally Rep. Barney Frank Wants to Make Internet Gambling Legal,* Opposing Views, May 10, 2009, http://www.opposingviews.com/i/rep-barney-frank-wants-to-make-internet-gambling-legal.

[64] *See* Rose, *supra* note 52, at 539 (detailing policies and procedures to identify and prevent restricted transactions).

[65] Rose, *supra* note 60, at 548; *see also* Wajda, *supra* note 14, at 332-33 (discussing UIGEA's burden on financial institutions). By requiring financial institutions to "identify and block" transactions involving illegal Internet gambling, UIGEA drains financial institutions of time and money. Rose, *supra* note 52, at 539.

[66] Prohibition on Funding of Unlawful Internet Gambling, 73 Fed. Reg. 69,382, 69, 397 (Nov. 18, 2008) (codified at 31 C.F.R. pt. 132).

[67] Banks are not required to allow payments for "lawful" gambling transactions, and they can block or "over block" all transactions related to gambling if they choose, without additional liability. This no-liability provision applies to all restricted transactions, transactions the party reasonably believes to be restricted, and restrictions made in reliance on policies and procedures of a designated payment system. *See* 31 U.S.C. § 5364(d)(1)-(3) (2006) (describing UIGEA's liability shield).

[68] Wadja, *supra* note 14, at 328 (citing John Gray, *Texas Fold 'Em*, CAN. BUS., Oct. 9, 2006, at 44); *see also* Benjamin B. Nelson, *Regulation or Prohibition? The Troubled Legal Status of Internet Gambling Casinos in the United States in the Wake of the Unlawful Internet Gambling Enforcement Act of 2006*, 9 TEX. REV. ENT. & SPORTS L. 39, 45-47

aid the United States with its prosecutions.[69] Moreover, UIGEA will not help the United States with the World Court and charges that it has discriminated against legitimate foreign businesses.[70]

While UIGEA makes it more difficult to deposit money into online casinos, gamblers have found ways to work around these regulations.[71] For one thing, casinos may use deceptive names to hide the true nature of their business. As a result, the new rules force the financial institutions to be on the lookout for hidden corporations.[72] It is also easy to advance funds to an offshore third-party processor who can then transfer funds to the casino for later play.[73] Since these third-party processors are set up offshore, the jurisdictional limitation issue reappears and enforcement becomes very difficult.[74] To further complicate matters, these third-party processors often mix legal and illegal transactions.[75]

UIGEA makes illegal online casinos harder to operate, but the great profit to be made is a powerful incentive. Virtual casino operators will assist gamblers set up bank accounts with foreign

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(2007) (discussing the difficulty the United States has had prosecuting offshore online casino operators).

[69] Joel Michael Schwarz, *The Internet Gambling Fallacy Craps Out*, 14 BERKELEY TECH. L.J. 1021, 1047-48 (1999).

[70] UIGEA specifically states that "[t]he term 'unlawful Internet gambling' shall not include any activity that is allowed under the Interstate Horseracing Act of 1978 (15 U.S.C. §3001 *et seq.*)." 31 U.S.C. § 5362(10)(D)(i) (2006). This exception creates a problem due to the "market access" limitations of the GATS. First Submission of Antigua and Barbuda, *supra* note 18, at § 5.4.1(A). The WTO claimed that UIGEA essentially wipes out the entire Antiguan industry while at the same time allowing domestic companies to offer certain services under the IHA. *See Antigua Seeks EU Support on WTO Case Against US Online Gambling Laws*, POKERPAGES, Feb. 11, 2007, http://www.pokerpages.com/poker-news/news/antigua-seeks-eu-support-on-wto-case-case-against-us-online-gaming-laws--29524.htm; *see also* Interstate Horseracing Act of 1978, 15 U.S.C. § 3001 (2006) (finding that the policy of the Congress is "to regulate interstate commerce with respect to wagering on horseracing"). Unfortunately, the passage of the UIGEA does not put the United States in compliance with the WTO standards and, in fact, appears to further violate more WTO laws because it reinforces its discriminatory practices against foreign companies. *See* Rose, *supra* note 52.

[71] Bryant M. Leonard, *Highlighting the Drawbacks of the UIGEA: Proposed Rules Reveal Heavy Burdens*, 57 DRAKE L. REV. 515, 532 (2009).

[72] Prohibition on Funding of Unlawful Internet Gambling, 72 Fed. Reg. 56,684-85.

[73] *See* Wajda, *supra* note 14, at 328.

[74] *See supra* notes 34-35 and accompanying text.

[75] *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 13, at 27 (2002) (noting that e-wallets are used for legitimate as well as illegitimate purposes).

banks so that they can transfer the money to the online casino.[76] Casual and youthful gamblers might be unlikely to set up such accounts, and that is a benefit from the law, but they could turn to a very simple way of transferring money—writing a check. UIGEA exempts paper checks because the sheer volume of handling and processing checks would make monitoring impossible for banks.[77]

Under UIGEA, the cost of regulation will be borne solely by financial institutions.[78] Without any other way to recoup this expense, it does not require much imagination to figure out to whom these costs will be passed. There is, however, serious concern about smaller banks. Compliance enforcement could force some smaller banks out of the market completely because "they do not have the funds, technological resources, or personnel to successfully monitor" the spending habits of their customers.[79]

Under UIGEA, gamblers will likely shift their betting from regulated publicly traded companies to unregulated private websites.[80] The major legal sites, those that are well regulated, have already distanced themselves from the United States market.[81] Under UIGEA, only private Internet sites, which are essentially unregulated, are available.[82]

UIGEA was intended to reduce the risk of money laundering.[83] However, when it comes to transferring money to online casinos, UIGEA has essentially forced the American gambler to avoid domestic financial institutions and use offshore third-party processors.[84] If the online gaming industry were regulated, there would be no reason to bypass domestic financial institutions. Regulation would allow for better monitoring, thereby reducing the risk of money laundering. The ultimate effect of UIGEA is to diminish reputable payment processors and replace them with those that might not leave a paper trail.

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[76] *See* Wajda, *supra* note 14, at 329.

[77] John Heylar, *New Anti-Gambling Laws Won't Stop Online Bettors*, ESPN.com, Oct. 3, 2006, http://sports.espn.go.com/espn/news/story?id=2611872. With the exception of credit and debit card transactions, the final rule does not require policies and procedures specifically for blocking payment transactions. *Id.*

[78] *See* Prohibition on Funding of Unlawful Internet Gambling, 72 Fed. Reg. 56,680, 56,680-81 (Oct. 4, 2007) (codified at 31 C.F.R. pt. 132).

[79] *See* Wajda, *supra* note 14, at 332.

[80] Catherine Holahan, *Online Gambling Goes Underground: A U.S. Law Aimed at Cracking Down Internet Gambling May Drive the Practice More Into the Shadows and Do Little to Deter Bettors*, BUSINESSWEEK, Oct. 19, 2006, *available at* http://www.businessweek.com/print/technology/content/oct2006/tc20061019_454543.htm.

[81] *Id.*

[82] *Id.*

[83] Frank Ahrens, *New Law Cripples Internet Gambling; Banks Are Barred From Handling Transactions*, WASH. POST, Oct. 14, 2006, at A1.

[84] *See* Holahan, *supra* note 80.

By making online gambling illegal, UIGEA provides little incentive for offshore Internet gambling sites to prevent underage gambling (since these sites already operate illegally).[85] UIGEA also does nothing to help reduce fraud or assure that winners will be paid.[86] An online gambling operation that conducts its business overseas is beyond the United States' jurisdiction and can escape liability for violating American laws. Furthermore, a ban on Internet gambling might dissuade some people from gambling, but anyone can still go online and find a virtual casino. Therefore, UIGEA is unlikely to prevent much gambling addiction. It merely places the addict in a riskier and more unscrupulous gambling environment.

Finally, as a result of UIGEA's prohibitory approach, as opposed to taxing and regulating the industry, it is estimated that American enterprises are missing out on seven billion dollars in revenue annually.[87]

CONCLUSION

UIGEA creates an unnecessary burden on financial institutions and has problems regarding jurisdiction and enforceability that seem too great to overcome. UIGEA ensures that no domestic company can enter the market and that most legitimate foreign sites will close their doors to Americans. Therefore, the only places left for Americans to gamble are unregulated and untrustworthy. As a result, the problems UIGEA was designed to curtail are likely to increase.

Since Internet casinos cannot be stopped as long as they are legal in other nations, American lawmakers should focus on a certification process for online casinos. Gambling operations should be given the opportunity to develop online casinos which would be accessible through a regulatory gateway page.[88] Gamblers wanting assurance of fair games would presumably be interested in using the regulated pages (particularly when they are linked to well-established casino brand names).

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[85] Kiran S. Raj, Comment, *Drawing a Line in the Sand: How the Federal Government Can Work with the States to Regulate Internet Gambling*, 56 EMORY L.J. 777, 798 (2006).

[86] Bunnam Srephichet, Comment, *Pirates of the Caribbean: Offshore Internet Gambling Sites Cursed by the Unlawful Internet Gambling Enforcement Act*, 30 HASTINGS COMM. & ENT. L.J. 139, 142 (2007).

[87] McBurney, *supra* note 14, at 338.

Reasonable regulations could be put in place to assure fair games, verify the age of gamblers, collect taxes, and minimize the risk to problem gamblers (to the extent that is possible). Unregulated online gaming would still exist, but if this regulation were done correctly, these officially sanctioned web pages should be able to capture a significant portion of the market. Consumers would have the choice of betting with casinos that are regulated and fair, or they could take their risks with other entities that are less secure but might offer better odds due to the decreased cost of operation. Foreign companies could also get certified and thereby qualify to operate within this nation, which would help to resolve the problem of the WTO and the World Court. In the end, the market could play a significant role in bringing online gaming under control.

The Internet age has been upon us for almost two decades. The current waive of legalized gambling is older than that. They have found each other, and many illegal or foreign operators are profiting while American gamblers risk the social consequences of dealing with unregulated operators. The recently-enacted UIGEA is unlikely to be effective in either stopping the gambling or reducing the adverse social consequences. In fact, the primary impacts of that legislation may be to increase the risk for problem gamblers and at the same time burden the financial industry. With appropriate regulation and faith in the free market, legislators could provide a better deal for gamblers, domestic businesses, the financial industry, and the American society at large. It's not a sure thing, but it is the best bet.

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[88] For instance, Charity Navigator, http://www.charitynavigator.org, an independent charity evaluator, tries to advance a more efficient and responsive philanthropic marketplace. It evaluates the IRS filings from over 5,500 of America's largest charities. Potential donors can go there to get information before deciding to make a gift. If the donor decides to make the gift, it may be done directly from the Charity Navigator web page. Such gateway pages were employed in order to verify the legitimacy of charities in light of the Tsunami disaster in 2004-05.

THE CRIMINAL RESPONSIBILITY OF INTERNET SERVICE PROVIDERS IN GERMANY

Dr. Dieter Dörr[*] *& Steffen Janich*

INTRODUCTION

In the area of cyber crime we are often confronted with the problem that an effective prosecution of the actual offender is difficult, if not impossible. This problem is mostly connected to the anonymity and globality of communication on the internet. Not only in the case of public internet terminals or the use of unprotected wireless networks is the tracing of delinquents problematic, but anonymization services such as AnOn severely increase the difficulty as well. Even the use of e-mail addresses, where no registration is required or the provider does not verify the registration data, can prevent the prosecution of offenses committed while using the e-mail address.

These difficulties have raised the question: to what extent is the information and communication industry responsible for offenses committed by third persons abusing the infrastructure of the internet? This question is of utmost importance for the internet economy. A responsibility for criminal content on the internet would bring about severe punishment for internet providers. A few years ago, the actions of the German judiciary against several internet providers—mainly against CompuServe Germany[1]—caused a worldwide disturbance[2] and the removal of servers from Germany to other countries. The CompuServe proceedings will be discussed later in more detail.

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[*] Chair in Public Law, International and European Law, Media Law, Director of the Mainz Media Institute.

[1] Amtsgericht München, Multimedia und Recht [Local Court of Munich] 1998, 429.

[2] *See* Seiber, Multimedia und Recht 1998, 429 (438) (concerning the criticism by the German and the international press).

This question about the responsibility of the information and communication industry for offenses committed by third parties raises numerous legal problems, which are closely connected to the complex technical architecture of the internet. Several persons, or rather companies, are involved when someone is accessing criminally relevant content. For instance, the download of child pornography from an internet page not only involves the actual provider of the content and the user, but also the host provider, who supplies the webspace for the content, and the access provider of the user. Without the participation of these providers, most of the offenses could not be committed. On the other hand, these providers are often not capable of preventing criminal activity. And even if prevention would be theoretically possible, we would have to ask whether an intervention of the providers would be reasonable, considering the immense amount of data. Regarding this, the ongoing development in the area of technical controlling possiblities, which enables providers to monitor and trace activities on the internet without requiring massive amounts of human resources, leads to a strong dynamic in the legal policy discussion. Currently in Germany there is a debate mostly about an obligation to prevent access to child pornographic[3] and terrorist[4] content by blocking or deleting the pages.

But before this article covers these concrete responsibility questions, the next section discusses a few general aspects of German internet regulation.

TELEMEDIA REGULATION IN GERMANY: A MIXED SYSTEM

First, it is important to know that the German legislature uses the term telemedia for all electronic information and communication services.[5] Thus, most of the offers on the internet, such as webshops, online auction services, search engines, podcasts, chatrooms and web portals, are included in this definition. Even private websites or blogs are considered telemedia. Only selected telecommunication services and radio broadcasting are an exception to this. For example, internet telephone and internet radio are not considered telemedia.[6]

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[3] *See* Von Christian Stöcker, *Von der Leyen lässt Kinderpornographie aus dem Netz filtern*, SPIEGEL ONLINE, Jan. 15, 2009, http://www.spiegel.de/netzwelt/web/0,1518,601517,00.html (discussing the plans of the Federal Ministry for Family, Seniors, Women and Youth to prevent access to child pornographic content).

[4] *See* Ingrid Melander, *Web Search for Bomb Recipes Should be Blocked: EU*, REUTERS, Sept. 10, 2007, http://www.reuters.com/article/2007/09/10/us-eu-bombs-internet-idUSL1055133420070910.

[5] *Compare* § 1 Abs. 1, 1 Telemediengesetz, *with* § 2 Abs. 1, 3 Rundfunkstaatsvertrag.

Telemedia in Germany is not regulated by a single law, but through a mixed system of regulations.[7] This mixed regulation is mostly a result of a dispute between the federal government and the federal state governments about regulation competence regarding telemedia. Thus, today we find legal specifications in the "Rundfunkstaatsvertrag" ("RStV") and in the Federal Telemedia Act ("TMG"). There has been a compromise, according to which the federal government is responsible for the economic part of telemedia, while the federal states cover all aspects regarding the content in a special section of the RStV, namely the paragraphs following paragraph 54.[8] These regulations also address such telemedia services which are concerned with journalistic and editorial work and specify restrictions for the content of these services. At the core of this are regulations concerning compliance with journalistic principles, certain information responsibilities, and a demand for counterstatements, as well as specific data protection regulations and instructions for advertisement. On the other hand, the federal government set down regulations when it issued the "German Telemedia Act" on March 1, 2007. The Telemedia Act replaced the "Teledienstegesetz" ("Teleservice Law") and the "Teledienstedatenschutzgesetz" ("Teleservice Data Protection Law"), thus unifying these separate regulations. Central to the Telemedia Act are, along with a universal right of access and the country of origin principle, instructions for transparency, as well as area-specific data protection rules. But most of all, the Telemedia Act regulates, in the paragraphs 7 to 10, the responsibilities of telemedia providers for their content, which is the topic of this article. First, this article will discuss the origin of these responsibility regulations.

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[6] *See* MARCO GERCKE & PHILLIP W. BRUNST, PRAXISHANDBUCH INTERNETSTRAFRECHT [PRACTICE MANUAL OF INTERNET CRIMINAL LAW] pt. 565 (2009); PETER SCHMITZ, § 1 Telemediengesetz 8, *in* GERALD SPINDLER & FABIAN SCHUSTER, RECHT DER ELEKTRONISCHEN MEDIEN (2008).

[7] DIETER DOERR & ROLF SCHWARTMANN, MEDIENRECHT pt. 271 (2008).

[8] *See id.* at 272; GERCKE & BRUNST, *supra* note 6, at 566; PETER SCHMITZ, § 1 Telemediengesetz 3, *in* SPINDLER & SCHUSTER, *supra* note 6.

DEVELOPMENT OF REGULATIONS FOR RESPONSIBILITY

In the course of the rising importance of the internet in regards to daily communication in the middle of the 1990s, criminal prosecution authorities were increasingly faced with the phenomenon of data network criminality.[9] In particular, this involved the exchange of pornographic and child pornographic pictures via the internet. Due to the lack of specialized legal regulations, the investigation authorities and especially the courts, were in charge of developing limiting criteria to prevent penal responsibilities from escalating out of control.

As I mentioned at the beginning of this article, the fact that the Munich prosecutors' office commenced a preliminary investigation against the director of the access provider CompuServe in 1996 for assisting in the spread of pornographic material, led to worldwide criticism and caused the legislature to create specialized regulations for the responsibilities of service providers in 1997.[10] The teleservice law and the media services state contract were thus rather early in comparison to an international level. In doing so, the German legislature was guided by the results of a commission of experts, which was working on the basic principles of a standardized responsibility regulation on an EU-level. These propositions were planning a graded responsibility, which the German legislature adopted, anticipating the EU-regulation.

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[9] *See* STEPHAN ACKERMANN, AUSGEWÄHLTE PROBLEME DER MAILBOX-KOMMUNIKATION (1994); ULRICH SIEBER, THE INTERNATIONAL EMERGENCE OF CRIMINAL INFORMATION LAW (1992); Tonio Walter, NSTZ 1990, 523.

[10] *See* The Elucidation in the Bill, Bundestag Drucksache. 13/7385, p.16 (Printed Matter of the Federal Parliament) (concerning the history of the TDG 1997).

Then, in 2000, the directive on electronic commerce[11] was passed. And despite the economic focus of the directive, the responsibility regulations also contained penal issues.

In regards to the development of media regulation, the federal government and the federal states agreed on a restructuring of the legal principles. The split codification of the responsibility regulations was supposed to be resolved with the aforementioned German Telemedia Act. Ignoring claims for amendment and specification,[12] regulations regarding responsibility were transferred from the teleservices law without any changes.[13]

AIM AND CLASSIFICATION OF RESPONSIBILITY REGULATIONS

The aim of the regulations derives itself from the field of problems mentioned at the beginning of this article. If the providers of online services are held responsible, we face the danger of escalating liability. Contrary to that, the operation and use of modern communication media should not lead to unforeseeable legal risks. That would be detrimental not only to the individual person, but also to the international competitiveness of Germany. Thus, the legislature has stated liability priviliges for service providers.

In doing so, a distinction between civil law, public law, and penal law was omitted. Paragraphs 7 to 10 of the Telemedia Act apply to all fields of law. This led to an extensive debate in jurisdiction and science as to how these limitations of liability are to be dogmatically classified.[14] The dominant opinion in science is that the privilege has to be seen as a sort of filter encompassing all fields of law, which has to be considered before either the civil law basis of claim, the public law basis of intervention, or even before the examination of a criminal offense.[15] This is what the legislature had in mind when introducing the liability privilege.[16]

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[11] Directive of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, 2000, 2000/31.

[12] *See, e.g.*, the statement of *BITKOM e. V.* on the bill for unification of rules on certain electronic information and communication services (Elektronischer-Geschäftsverkehr-Vereinheitlichkeitsgesetz [EIGVG], Aug. 18, 2006, p. 7); the statement of *eco – Verband der Deutschen Internetwirtschaft e. V.* on the questionnaire of the Federal Ministry of Economics and Technology on the regulation of the provider's responsibility ([TMG], Dec. 10, 2007, p. 2).

[13] *See* BT-Drs. 16/3078, p. 15 (Printed Matter of the Federal Parliament).

[14] *See generally* ULRICH SIEBER, VERANTWORTLICHKEIT IM INTERNET [ACCOUNTABILITY ON THE INTERNET] 114 (C.H. Beck Verlag ed. 1999).

Now that we have covered the basic information about German provider responsibility, let us consider the actual liability privileges in detail.

THE GRADED LIABILITY SYSTEM

The Telemedia Act separates between the functions of service providers and supplies a graded system of responsibility. Without using the now familiar English terms, it distinguishes between content providers, access providers, proxy-cache providers, and hosting providers.

Hosting providers provide storage and access to third party content through their own computer system—the so-called server. For the user to access the internet, he requires an access provider, which transfers the information to the user. Given that the transmission distance to the user is often very long, the proxy-cache provider supplies intermediate storage in order to speed up the transmission of frequently accessed content. Those at last who offer their own data via their own computer or the server of the hosting provider, are called the content provider.[17]

Regarding the question of responsibility, the Telemedia Act makes a basic distinction between providing one's own content or the content of someone else.

LIABILITY FOR ONE'S OWN CONTENT

There are no exceptions for the liability of persons who provide their own content, be it on their own computer or the server of someone else. The content provider is thus completely liable according to the general rules. Whether he has copy or utilization rights is irrelevant.[18] As an example, someone who provides pornographic material without access control, and thus enables minors to access it, makes himself liable to prosecution.[19]

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[15] Bundesgerichtshof [BGH] [Federal Court of Justice], 2004, 166 [MMR]; Gustav Altenhain, Archiv für Presserecht [AfP] [Archive for Press Law] 1998, 457; Stefan Engel-Flechsig, Frithjof A. Maenne & Alexander Tettenborn, NJW 1997, 2981 (2984); Moritz, CR 1998, 500; Sieber, CR 1997, 581.

[16] *See* BT-Drs. 14/6098, p. 23 (Printed Matter of the Federal Parliament).

[17] *See generally* SIEBER, *supra* note 14, at 10 (regarding the function-specific differentiation and the basics of network technology).

A liability privilege in the sense of the Telemedia Act therefore always requires external content. But this raises the question: how do we define one's own and someone else's content? Connected to this, the CompuServe decisions in 1999 and 2000[20] attracted a lot of attention in Germany. The question there was, whether the director of a German company (CompuServe GmbH Deutschland), which provided access to the internet and child pornography forums through the network of the U.S. parent company (CompuServe USA), could be penally charged or not. The responsible district court of Munich was apparently motivated by the hope of creating a penal internet control on an international level, based on the German penal law.[21] The result was a severe prison sentence for the director of CompuServe Deutschland, even though there had been no possibility for him to influence the content of the service provided by the parent company. The subsidiary company in Germany only granted access to data available through the service of CompuServe USA. Yet the district court held the opinion that one could not talk about external content, seeing how CompuServe Deutschland is completely controlled by the American parent company. Therefore the liability privilege, which was still placed in paragraph 5, clause 3 of the Tele Services Act back then, was not applied to the case. What the district court did not acknowledge was the fact that when answering the question about the origin of content provided, one cannot rely on the organizational structure of a company. If a provider simply connects to an external network, the information available there is external content, even if the connection is established by a subsidiary company.[22] A similar point of view was adopted by the regional court of Munich, which cleared the director of all charges.

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[18] Koch, CR 1997, 193 (197); Spindler, NJW 1997, 3193 (3196); Pelz, ZUM 98, 530 (532).

[19] Bundesgerichtshof [BGH] [Federal Court of Justice], 2001, 596 [NStZ]; TATJANA HÖRNLE, § 184, pt. 45, *in* MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH [MUNICH COMMENTARY ON THE CRIMINAL CODE] (2005).

[20] *See supra* note 9.

[21] *See* Kühne, NJW 2000, 1003 (1004).

As shown by this case, the separation between one's own content and external content is frequently causing problems. These difficulties are enhanced when one turns external content into one's own content.[23] How this happens is a point of debate as well. Usually this has been tied to the press law liability, making use of the externally visible attitude of the service provider regarding the content.[24] But this transfer from the press law is not correct in its generality. A provider of child pornographic material cannot free himself from penal liability by stating his disapproval and refusing to take responsibility for the pictures. Externally visible attitudes toward the content are thus only exclusively relevant as criteria of classification in regards to a statement of fact or opinion, but not in regards to child pornography or copyright infringement. To determine whether a provider has adopted content as his own requires a general examination of the individual case. One can assume internal content if the data has been knowingly selected or transferred, or if someone identifies with the content in a way which an objective observer would assume that the provider wishes to take responsibility for the content.[25] Thus, a service provider adopts unchanged external content if he examines the content in an editorial process—for example, moderation in a news group—or if he issues a universal acceptance of responsibility. But the knowledge that a certain file is on one's server is not sufficient.[26]

Whether providing a link constitutes one's own content is a heavily debated question as well. To some extent, links are only considered a mediation of access to external content.[27] Other authors propose an unlimited liability.[28] But in this case as well, a distinguishing solution on an indivual basis is most convincing.[29] Someone who agrees to the provided content in his own words adopts it as his or her own.[30] Incidentally, the number of links and the amount of data they relate to are relevant as well. Universal references to a large amount of data or documents can hardly be seen as an adoption of content. A different point of view is required for links to clearly arranged summaries, or so-called jump labels, automatically linking to a certain part of a larger page.[31] If there are further links on the referenced page, the liability never extends to this second level.[32] Also, the referenced page is only examined at the moment the link has been placed, and there is no obligation to recheck already placed links.[33] If the person who placed the link has to accept the content as his own, he is—most of the time—not to be considered the offender; rather he should be punished for assistance, as he does not control the content or continuance of the referenced page.[34]

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[22] *See* Kühne, NJW 1999, 188 (189); Sieber, MMR 1998, 429 (439).

[23] *See* BT-Drs. 13/7385, p. 19 n.23 (Printed Matter of the Federal Parliament).

[24] *See, e.g.,* Eichler, K&R 1998, 412 (414); Koch, CR 1997, 193 (197); Pelz, ZUM 1998, 530 (532); Pilcher, MMR 1998, 79 (86); Spinler, NJW 1997, 3193 (3196); Vassilaki, MMR 1998, 630 (633).

[25] *See* SIEBER, *supra* note 14, at pt. 294.

[26] THEODOR LENCKNER ET AL., § 184 pt. 58, *in* ADOLPH SCHÖNKE & HORST SCHRÖDER, KOMMENTAR ZUM STRAFGESETZBUCH [COMMENT ON THE PENAL CODE] (2006); HÖRNLE, *supra* note 19, at pt. 47.

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[27] Koch, *supra* note 24, at 198; LENCKNER ET AL., *supra* note 26, at pt. 66.

[28] DIRK-MICHAEL BARTON, MULTIMEDIA-STRAFRECHT 357 [MULTIMEDIA-CRIMINAL] (1999); LACKNER ET AL., KOMMENTAR ZUM STRAFGESETZBUCH § 184 pt. 7b (2007).

[29] Engel-Flechsig, Maennel & Tettenborn, *supra* note 15, at 2985; Engels & Köster, MMR 1999, 522 (523); Gehrke, ZUM 2001, 34 (39); Haft & Eisele, JuS 2001, 112 (117); HÖRNLE, *supra* note 19, at pt. 47; Kloos, CR 1999, 46 (47); Köster & v. Bonin, ZUM 1997, 821 (824); SIEBER, *supra* note 14, at pt. 307; Spindler, NJW 1997, 3193 (3198); Spindler, CR 1998, 745 (752); Vassilaki, MMR 1998, 630 (636); Vassilaki, CR 1999, 85; Gehrke, ZUM 2001, 34 (39).

[30] Engel-Flechsig, Maennel & Tettenborn, *supra* note 15, at 2985; OLIVER BOESE, STRAFRECHTLICHE VERANTWORTLICHKEIT FÜR VERWEISUNGEN DURCH LINKS IM INTERNET [CRIMINAL RESPONSIBILITY FOR BEING MADE THROUGH LINKS ON THE INTERNET] 88 (2000); SIEBER, *supra* note 14, at pt. 309.

[31] SIEBER, *supra* note 14, at pt. 308.

[32] Flechsig & Gabel, CR 1998, 351 (356); Löhnig, JR 1997, 496 (498); Park, GA 2001, 23 (32); Gehrke, ZUM 2001, 34 (39); Spindler, MMR 2002, 495 (503); SIEBER, *supra* note 14, at pt. 308. *Contra* Lackner & Kühl, pt. 7b.

[33] Berlin-Tiergarten [AG Berlin] [Criminal Court of First Instance in Berlin] June 30, 1997, 260 DS 857/96, CR 1998, 111; Lübeck, Nov. 24, 1998, 11 S 4/98, CR 1999, 650; Haft & Eisele, JuS 2001, 112 (117); Gehrke, ZUM 2001, 34 (39); SIEBER, *supra* note 14, at pt. 313. *Contra* Löhnig, JR 1997, 496 (498); Müglich, CR 2002, 583 (591).

[34] Löhnig, JR 1997, 496 (497); Vassilaki, MMR 1998, 630 (636); Vassilaki, CR 1999, 85 (87); Flechsig & Gabel, CR 1998, 351 (356). *Contra* Koch, MMR 1999, 704 (708); BOESE, *supra* note 30, at 127.

Thus, as an intermediate result, the question of whether it is one's own content, or external content, is relevant for a service provider's penal liability, even if it is not always easy to answer. Only in the latter case can we consider a liability privilege.

LIABILITY FOR EXTERNAL CONTENT

Between the providers of external content then, the German legislator provides us with further categories.

Access Provider

One who limits himself to transmit information or provide access to the usage of information will not be followed up by prosecution.[35] Thus, the Telemedia Act excludes access providers from any kind of liability. An example of an access provider would be telecommunication companies who provide internet access via telephone lines to their customers. But the exemption from liability is only valid, if (1) the access provider does not initiate the transmission in question, (2) does not pick the address of the transferred information, and (3) does not select or change the transmitted information.

This privilege gives credit to the enormous importance of access providers for the information society, which should not be burdened with incalculable liability risks.[36] There would be no plausible reason to charge a provider with assistance to the spread of pornographic material just because the pornographic content was transmitted through the provider's infrastructure.

At the same time, the legislature supports this privilege with the knowledge that a control of the data stream by the access provider would—in most cases—be technically impossible.[37] The legislature, however, consciously refrained from connecting liability privileges to technical incapability. Therefore, the access provider never has the obligation to guarantee an investigation or surveillance of content transmitted by him, whether it is technically possible or not. This is especially important because the current assessment of control possibilities can only be seen as a snapshot in time due to rapid technical development. When looking at the controversial yet successful filter attempts in China, a review of the technical influence that access providers are capable of is necessary.[38]

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[35] Telemediengesetz [Telemedia Act], Jan. 18, 2007, ¶ 8, clause 1.

[36] BT-Drs. 14/6098, p. 24 (Printed Matter of the Federal Parliament); GERCKE & BRUNST, *supra* note 6, at pt. 608; TOBIAS PAUL, PRIMÄRRECHTLICHE REGELUNGEN ZUR VERANTWORTLICHKEIT VON INTERNETPROVIDERN AUS STRAFRECHTLICHER SICHT [PRIMARY LEGAL RULES ON THE LIABILITY OF INTERNET PROVIDERS FROM CRIMINAL LAW] 126 (2005).

[37] *See* SIEBER, *supra* note 14, at pt. 88 (concerning the technical control possibilities).

It is also important to mention that even if the access provider is aware of transmitting penally relevant material, he is still not held responsible.[39] Even though the legislature explicitly included knowledge of penal content as a restriction for the other privileges (which is discussed later), this is not the case for access providers.

Yet the German legislature does restrict the privilege for access providers. According to the second sentence of paragraph 8, clause 1 of the Telemedia Act, the privilege is not applicable if the service provider deliberately cooperated with a user of his service to commit illegal activities. For this cooperation, it is not necessary for provider and user, who can himself be a provider again, to act as joint offenders.[40] It is sufficient if the provider gives assistance to commit a criminal offense—for example—through the provision of necessary links. But of course this raises the question of whether this collusive behavior does not constitute internal content according to paragraph 7, clause 1 of the Telemedia Act.

Finally, in regards to access providers, it should be mentioned that the liability privilege is also effective if content is shortly and automatically cached on a server, as long as it is not saved longer than necessary for the transmission.[41]

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[38] *See also* SIEBER & NOLDE, SPERRVERFÜGUNGEN IM INTERNET: NATIONALE RECHTSDURCHSETZUNG IM GLOBALEN CYBERSPACE? [BLOCKING ORDERS ON THE INTERNET: NATIONAL LAW ENFORCEMENT IN THE GLOBAL CYBERSPACE?] (2008).

[39] BT-Drs. 14/6098, p. 24 (Printed Matter of the Federal Parliament).

[40] LENCKNER ET AL., *supra* note 26, at pt. 59.

[41] Telemediengesetz [Telemedia Act], Jan. 18, 2007, ¶ 8, clause 2.

Proxy-cache Provider

Separated from the short-term caching of access providers is the "cache-privilege" included in paragraph 9 of the Telemedia Act. As mentioned at the beginning of this article, proxy-cache providers cache commonly demanded content, so it does not have to be transmitted by the content-provider repeatedly. This leads to popular content being cached on various servers. Due to the economic importance of these cachings, the legislature decided to include it in a special privilege. Even though the caching is usually done by access providers, the legislature rightly decided to split the liability for caching from the responsibilities of access providers and created a special regulation.[42]

According to paragraph 9 of the Telemedia Act, operators of such proxy-cache servers are not liable for automatic, temporally limited cachings, which serve the purpose to efficiently transmit external content to users on their demand. But to qualify for this liability privilege, proxy-cache providers need to fulfill a complex system of cumulative requirements.

First, the content must not be altered. This is meant to ensure that the copy on the proxy-server resembles the initial version on the original server.[43]

Second, the requirements for accessing the information must not be disregarded. Thus, the provider of the proxy-server may not alter the access requirements set forth by the owner of the original server.[44] If, for example, the operator of a website installed a password protection to meet youth protection standards, this password protection would need to be guaranteed when accessing the content through the proxy-server. Any kind of access control or restriction must be maintained.

Third, the provider must follow the widely accepted rules for updating content. By this, the provider is bound to regularly compare the cached information to the initial source, verify whether the original has been changed, and update his cached version if necessary.[45]

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[42] BT-Drs. 14/6098, p. 24 (Printed Matter of the Federal Parliament).

[43] *Id.* at p. 25.

[44] *See supra* note 41.

Fourth, the proxy-cache provider is not allowed to interfere with data collection technologies. Therefore, he has to ascertain that a website access though his proxy-server is correctly transmitted to the access statistic of the original website.[46]

Finally, the provider is bound to delete the caching if at any time he is made aware of the original source being removed or blocked. This is especially related to cases where the removal or blocking has been judicially or officially ordered. In this way, the legislature accounts to a general problem when issuing removal or blocking decrees. Due to caching, illegal content remains widely accessible even after the removal of the original source. If the proxy-cache provider does not delete penally relevant content, even though he is aware that it has been removed from the original server or the removal has been ordered, he can be prosecuted.

Of course, in a case of collusion, the liability privilege is void as well.

Host Provider

Finally the matter of host provider liability needs to be answered. As a reminder, a host provider enables users to save content on his computer. The classic example for such a service would be the provision of servers, where private persons as well as companies can host their websites.

The legislature assumed that a systematic content control is not possible for the host provider due to the sheer amount and rapid change of data saved on his servers. But what I said about access providers applies here as well: whether a monitoring of content is not possible must be critically reexamined due to technical development. The legislature, however, refrained from a universal control duty in this case as well, as not to unnecessarily burden the providers. Thus, service providers are—according to the first sentence of paragraph 10 of the Telemedia Act—not responsible for the external content they save for a user. Yet this only applies if the provider has no knowledge of the criminal activity or information. If he becomes aware of the content, the provider must take action immediately to remove it or block access to it. Otherwise, he is again fully liable for the content. Knowledge implies that the provider at least knows the exact place of discovery of the illegal information.[47] Whether this knowledge is based on the provider's research or external sources is irrelevant.[48] But due to the penal principle of guilt, it has to be available to the responsible person itself and cannot be attributed as external knowledge according to paragraph 14 or paragraph 166 of the German Civil Code.[49] If, for instance, the youth protection commissary of a company has gained this knowledge but did not pass it on to the director, the existence of knowledge will have to be declined.[50] A further requirement is that the technical possibilities to remove the content are there, and that it is appropriate to demand the removal, even though the law does not state so explicitly. In the legislature's view, this follows the basic principle that law cannot demand technically impossible or inappropriate actions.[51] Inappropriate, however, does not necessarily equate to economic reasons.[52] The point where it becomes inappropriate must be determined on a case-by-case basis, and is also connected to the value of the object of legal interest.[53] Usually this is rather unproblematic. If the host provider knows the concrete address the illegal content is affiliated with, a removal or blocking should be easily possible without further drawbacks to the provider.[54]

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[45] *Id.*

[46] BT-Drs. 14/6098, p. 25 (Printed Matter of the Federal Parliament).

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[47] LENCKNER ET AL., *supra* note 26, at pt. 60; Pelz, wistra 1999, 53 (59); *see* SIEBER, *supra* note 14, at pt. 338.

[48] BT-Drs. 14/6098, p. 23 (Printed Matter of the Federal Parliament); Holznage & Kussel, MMR 2001, 347 (349); LENCKNER ET AL., *supra* note 26, at pt. 60; SIEBER, *supra* note 14, at pt. 345.

[49] STEPHAN BLEISTEINER, RECHTLICHE VERANTWORTLICHKEIT IM INTERNET [LEGAL RESPONSIBILITY ON THE INTERNET] 186 (1999); LENCKNER ET AL., *supra* note 26, at pt. 60; SIEBER, *supra* note 14, at pt. 346.

[50] LENCKNER ET AL., *supra* note 26, at pt. 60.

[51] BT-Drs. 14/6098, p. 25 (Printed Matter of the Federal Parliament).

[52] DIRK BARTON, MULTIMEDIA-STRAFRECHT [MULTIMEDIA CRIMINAL LAW] pt. 350 (1999); HÖRNLE, *supra* note 19, at 52.

[53] BT-Drs. 14/6098 pp. 23, 25 (Printed Matter of the Federal Parliament); LENCKNER ET AL., *supra* note 26, at pt. 60.

CONCLUSION

When analyzing the respective regulations of the German Telemedia Act, it shows that even though they are briefly formulated, they are absolutely capable of handling the problems of liability arising on the internet. Of course, the regulations do not provide us with rules for every detail, but in light of the rapid technological development, this seems more of an advantage than a disadvantage. When measured according to legal security and flexibility, these regulations are a generally successful solution. Full liability for one's own content, limited liability for external content if one is aware of it, as well as the extensive exclusion from liability for the transmission and mediation of external content, is a proper approach to face the difficulties.

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[54] *See* Altenhain, AfP 1998, 457 (463); SIEBER, *supra* note 14, at pt. 359.

BRANDENBURG AND INCITEMENT IN A DIGITAL ERA

Russell L. Weaver[*]

The Internet has revolutionized communication by making it possible for ordinary people to directly communicate with each other. Prior to its invention, many people were forced to use much more primitive communications methods (e.g., giving speeches or distributing printed circulars). While more sophisticated communications technologies (e.g., newspapers, radio and television stations) were available, most of those technologies were subject to "gatekeepers" (e.g., editors, reporters, producers) who controlled access to the technology, and who could limit the ability of ordinary individuals to mass communicate.[1] In order to access these technologies, individuals must first convince the gatekeepers that their ideas are worthy of dissemination. The Internet, coupled with the development of personal computers, has largely freed people from the constraints of gatekeepers, and allowed them to directly communicate with each other. The political and social consequences of this newfound freedom have transformed communication. Using devices like e-mail, listservs, websites and blogs, not to mention Twitter and Facebook, private individuals now have the capacity to directly communicate with each other on a broad scale.[2] Individually, as well as through organizations like MoveOn.org and the Tea party, people are using the Internet to communicate much more broadly, and are beginning to reshape society and the political process.[3]

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[*] Professor of Law & Distinguished University Scholar, University of Louisville, Louis D. Brandeis School of Law.

[1] *See* RUSSELL L. WEAVER, FROM GUTENBURG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY AND THE IMPLICATIONS FOR DEMOCRACY (forthcoming 2011).

[2] *See id.*

[3] *See id.*

The same factors that create the Internet's dynamic political and social potential—easy access and the decline of traditional gatekeepers—create the potential for great mischief. Indeed, the Internet has permitted criminals to go high tech in the sense that they can use the Internet to distribute child pornography,[4] engage in sexual predation and child abuse,[5] and perpetuate fraudulent schemes. The Internet has also been used by extremist groups to propagate hate speech,[6] and Holocaust denial,[7] and is used by Internet gambling businesses (which, while perhaps legal, can produce significant adverse social consequences).

Of particular concern, given the events of 9/11 and other recent terrorist incidents, is that the Internet has provided a forum for terrorists, as well as other individuals who wish to advocate for various types of illegal conduct. There have been numerous high-profile examples in recent years. These include the Pennsylvania woman (nicknamed "Jihad Jane" by the media) who was indicted for plotting over the Internet to engage in terrorism,[8] a self-proclaimed pedophile who constructed a website advocating on behalf of pedophilia,[9] and a white supremacist who web-posted a poem describing the murder of a black President.[10]

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[4] *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (striking down portions of the Child Pornography Prevention Act of 1996 that prohibited "virtual" child pornography); New York v. Ferber, 458 U.S. 747 (1982) (upholding a New York criminal statute that prohibited individuals from knowingly promoting sexual performances by children under the age of sixteen years old).

[5] *See* Trymaine Lee, *Bill Would Bar Sex Offenders From Facebook and MySpace*, N.Y. TIMES, Jan. 30, 2008, at B4.

[6] See Russell L. Weaver, Nicolas Delpierre & Laurence Boissier, *Holocaust Denial and Governmentally Declared "Truth": French and American Perspectives*, 41 TEX. TECH. L. REV. 495 (2009).

[7] *See* RICHARD E. HARWOOD, DID SIX MILLION REALLY DIE? TRUTH AT LAST EXPOSED (2d ed. 1974), *available at* http://www.ihr.org/books/harwood/dsmrd01.html; *see also* Raffi Berg, *The Fight Against Holocaust Denial*, BBC NEWS, Apr. 14, 2005, http://news.bbc.co.uk/2/hi/europe/4436275.stm.

[8] *See* Dina Temple-Raston, *All Things Considered: Terror Suspect Jihad Jane's Unlikely Journey*, Nat'l Public Radio (Mar. 10, 2010), http://ww.npr.org/templates/story/ story.php?storyId=124537466.

[9] *See Mothers Fight Back Against Pedophile's Web Site*, ABC NEWS, July 30, 2007, http://abcnews.go.com/print?id=3426796 ("McClellan has operated detailed Web sites rating the best public places to watch young children at play and posting photos he's taken at events. He even rated locations based on how many little girls, or LGs as he call [sic] them, are there.").

Because of the potential for mischief, there have been increasing calls for Internet regulation. However, decisions about whether to regulate can present society with difficult issues, involving conflicting societal values. Particular problems are presented by speech that advocates illegality of one sort or another. For nearly half a century, the United States Supreme Court struggled to find the appropriate balance between free speech and the criminalization of "subversive advocacy." In its landmark decision in *Brandenburg v. Ohio,*[11] the Court struck the balance by holding that subversive advocacy cannot be prosecuted absent proof that it is "directed to inciting or producing imminent lawless action and that it is likely to incite or produce such action."[12]

Although *Brandenburg* has now been settled law for nearly half a century, legitimate questions might be raised about whether the Court's approach to subversive advocacy can or should change in light of the Internet and the war on terrorism. Most of the subversive advocacy cases involve individuals who used relatively more primitive speech technologies such as speeches[13] or the distribution of printed circulars.[14] These technologies were relatively less likely to reach large numbers of people, and therefore were less likely to have broad societal impact. It is unclear whether the *Brandenburg* formulation makes sense in a cyber environment.

This brief article does several things. First, it discusses United States Supreme Court decisions (and dissents) that led the Court to its holding in *Brandenburg*. Second, it discusses the *Brandenburg* decision itself, and the *Brandenburg* test. Finally, since *Brandenburg* was rendered in light of very different communications technologies, the article raises questions about whether *Brandenburg* can or should remain the prevailing test for dealing with incitement to illegality in an Internet era.

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[10] *See* Lauren Streib, *Poetic Justice: Kentucky Man Arrested for Threatening President with 16-Line Poem*, BUS. INSIDER (Feb. 20, 2010, 12:03 PM), http://www.businessinsider.com/poetic-justice-kentucky-man-arrested-for-threatening-president-with-16-line-poem-2010-2.

[11] 395 U.S. 444 (1969).

[12] *Id.* at 447.

[13] *Id.* at 444-45 (speech at a Ku Klux Klan rally).

[14] *See* Schenck v. United States, 249 U.S. 47 (1919).

I. THE LONG AND TORTUOUS ROAD TO *BRANDENBURG*

The United States Supreme Court's path to *Brandenburg* was neither easy nor direct. In many early cases, decided during or in the aftermath of World War I, the Court struggled to find the proper balance between the governmental interest in prohibiting subversive advocacy, and the societal interest in free speech. In those decisions, the Court consistently recognized that the government has a compelling interest in protecting itself against violent overthrow, and that it could therefore criminalize advocacy of overthrow. In the early decisions, the Court also paid lip service to the fundamental right of individuals to engage in political dissent, and it acknowledged that the dividing line between criminal conduct and free speech was not always precise.[15]

Many of the early subversive advocacy cases were decided in the wake of the Bolshevik Revolution, following the abdication of the Russian Czar, and the ensuing "Red Scare." In this extraordinary environment, when many feared that Communism might sweep the world, the Court tended to sustain criminal convictions while applying a "clear and present danger" test. The requirement of a clear and present danger was more theoretical than real since the Court did not make any meaningful inquiry into whether the danger was either "clear" or "present."

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[15] An influential lower court decision was rendered in *Masses Pub. Co. v. Patten*, 244 F. 535, 540, 542 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (1917), in which Judge Learned Hand distinguished speech that advocated "violation of the law" from expression that "arouse[d] a seditious disposition." Although the decision was reversed on appeal, Judge Hand's distinction between "incitement" and "advocacy" was ultimately accepted as the dividing line between protected and unprotected speech. *Id.* at 540. In Judge Hand's view, the necessary inquiry is "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." United States v. Dennis, 183 F.2d 201, 212 (1950).

Schenck v. United States[16] is illustrative of the early decisions. In that case, the Court sustained criminal convictions for violations of the Espionage Act which prohibited efforts to cause insubordination in the military, as well as attempts to obstruct enlistment in the military services. The indictment was based on the fact that defendants printed and distributed a circular urging men to resist the draft during World War I. The circular compared the draft to slavery, suggested that "a conscript is little better than a convict," and stated that "conscription [is] despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few."[17] In sustaining the indictment without any proof of immediacy or danger, the Court concluded that "the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out."[18] While the Court recognized that the circular might have been permitted in ordinary times, the Court emphasized that "the character of every act depends upon the circumstances in which it is done,"[19] and held that the question is whether "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[20] Analyzing the issue in terms of "proximity and degree," the Court noted that "[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."[21] The Court concluded that "we perceive no ground for saying that success alone warrants making the act a crime."[22]

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[16] 249 U.S. 47 (1919).

[17] *Id.* at 50-51.

[18] *Id.* at 51.

[19] *Id.* at 52

[20] *Id.*

[21] *Id.*

[22] *Id.*

During this period, the Court also upheld other convictions when (as in *Schenk*) the danger was neither very "clear" nor terribly "present."[23] For example, in *Debs v. United States*,[24] the Court upheld the conviction of a Socialist presidential candidate (Eugene Debs) for a campaign speech that he delivered in Canton, Ohio, in 1918. Debs's speech, "Socialism, Its Growth, and a Prophecy of Its Ultimate Success," paid tribute to "loyal comrades" who had been prosecuted for resisting the draft;[25] issued a prophecy regarding the "success of the international Socialist crusade;" and went on to state that: "I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone."[26] Finally, he endorsed the Socialist Party platform, which declared the war to be a crime, and urged "continuous, active, and public opposition to the war, through demonstrations, mass petitions, and all other means within our power."[27] Like Schenck, Debs was convicted under the Espionage Act for attempting to obstruct the draft and attempting to incite insubordination in the military forces. The jury was instructed that the defendant's conviction was justified if his words had a "natural tendency and reasonably probable effect" of impeding the conscription of soldiers.[28] Even though World War I was over by the time the case came before the Court, the conviction was upheld and Debs ultimately served thirty-two months in a federal prison.

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[23] For example, the Court decided *Frohwerk v. United States*, 249 U.S. 204 (1919), which involved a newspaper publisher who printed several articles criticizing World War I, praising the German nation, and blaming the war on Wall Street. In affirming Frohwerk's conviction, Justice Holmes emphasized that the country was at war, and concluded that:

> [W]e must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out.

Id. at 209.

[24] 249 U.S. 211 (1919).

[25] Debs went on to allege that:

> [T]he master class has always declared the war and the subject class has always fought the battles—that the subject class has had nothing to gain and all to lose, including their lives; that the working class, who furnish the corpses, have never yet had a voice in declaring war and never yet had a voice in declaring peace.

Id. at 213-14.

[26] *Id.* at 214.

[27] *Id.* at 216.

The seeds of the Court's modern approach to unlawful advocacy were sown in *Abrams v. United States*[29] in Justice Holmes's dissent from the majority's decision to uphold the convictions of several self-described Russian-born "anarchists," "revolutionaries," and "socialists" for violating the Espionage Act.[30] Defendants distributed circulars that made various allegations. One circular, entitled "The Hypocrisy of the United States and her Allies," chastised President Wilson, denounced capitalism, and called on workers to "awake" and "rise;" the signers referred to themselves as "revolutionists."[31] The second article, written in Yiddish, was entitled "Workers—Wake Up." After referring to "his Majesty, Mr. Wilson, and the rest of the gang, dogs of all colors!," the circulars described capitalism as the enemy of workers, called on armament workers to "strike" and "fight," and were signed by defendants who referred to themselves as "the rebels."[32] In sustaining the convictions, the

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[28] *Id.*

[29] 250 U.S. 616 (1919).

[30] *Id.* at 617-18.

[31] *Id.* at 619. The article referred to President Wilson's inaction:

> His shameful, cowardly silence about the intervention [of U.S. troops] in Russia reveals the hypocrisy of the plutocratic gang in Washington and vicinity . . . . He [the President] is too much of a coward to come out openly and say: 'We capitalistic nations cannot afford to have a proletarian republic in Russia.' . . . The Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine! Yes friends, there is only one enemy of the workers of the world and that is CAPITALISM. . . . [It concludes] Awake! Awake, you Workers of the World! REVOLUTIONISTS.

Id. at 620

[32] *Id.* at 620. The circular went on to state that:

> "Workers, Russian emigrants, you who had the least belief in the honesty of *our* government, must now throw away all confidence, must spit in the face the false, hypocritic, military propaganda which has fooled you so relentlessly, calling forth your sympathy, your help, to the prosecution of the war. With the money which you have loaned, or are going to loan them, they will make bullets not only for the Germans, but also for the Workers Soviets of Russia. *Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom.* . . . America and her Allies have be-

Court emphasized that the "obvious effect" of the circulars would be to persuade people "not to aid government loans and not to work in ammunition factories," and that the purpose was to defeat the war plans "by bringing upon the country the paralysis of a general [strike]," "to throw the country into a state of revolution, [and] thereby" frustrate the war effort.[33] The Court went on to emphasize that the circulars involved the publishing of "disloyal, scurrilous and abusive language about the form of government," using language "intended to bring the form of government" into "contempt, scorn, contumely and disrepute."[34] The Court concluded that defendants used this language intending "to incite, provoke, and encourage resistance" to the United States in the war, as well as to "urge, incite, and advocate curtailment of production of things" like ordnance and ammunition "necessary and essential to the prosecution of the war."[35] As in *Schenk*, there was no evidence suggesting that any readers of the circulars took any action in response to the circulars.

Holmes's dissent implored the Court to chart a new course. While he admitted that the circulars urged ammunition factory workers to strike, he argued that there was no evidence that defendants distributed the circulars "with intent by such curtailment to cripple or hinder the United States in the prosecution of the war."[36] He regarded the circulars as the equivalent

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> trayed [the Workers]. Their robberish aims are clear to all men. The destruction of the Russian Revolution, that is the politics of the march to Russia. *Workers, our reply to the barbaric intervention has to be a general strike! An open challenge* only will let the government know that not only the Russian Worker fights for freedom, but also *here in America lives the spirit of Revolution*. . . . Do not let the government scare you with their wild punishment in prisons, hanging and shooting. We must not and will not betray the splendid fighters of Russia. *Workers, up to fight*. . . . Woe unto those who will be in the way of progress. Let solidarity live!" It is signed, "The Rebels."

Id. at 621-22.

[33] *Id.* at 621-23.

[34] *Id.* at 617.

[35] *Id.*

[36] *Id.* at 626 (Holmes, J., dissenting).

of political rhetoric protected by the First Amendment,[37] and he urged the Court to impose the requirement of immediacy:

> But as against dangers peculiar to war, . . . [i]t is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. . . . [N]obody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.[38]

He then articulated his "marketplace of ideas" metaphor, and suggested that ideas should only be prohibited when they have the potential to cause immediate harm:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent . . . . [T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any

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[37] *Id.*

> A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime . . . . [T]he United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.

Id. at 627-28.

[38] *Id.* at 628.

> rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. . . . [W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe . . . unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument . . . that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law abridging the freedom of speech." Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here . . . .[39]

He argued that the circulars amounted to nothing more than political rhetoric, and thus should not have given rise to prosecution.[40]

Following *Abrams*, Justices Holmes continued to dissent in similar cases, and was joined by Justice Brandeis in many of those dissents. A number of subsequent cases dealt with the crime of "criminal syndicalism" or "criminal anarchy" which prohibited individuals from advocating the violent overthrow of the government. In these cases, the Court confronted many of the same tensions that it confronted in the *Schenck* case. In other words, the Court was forced to decide whether defendants could be convicted without proof of an imminent threat to the government based solely on their belief or advocacy of a violent overthrow of the government. The Court upheld convictions in decisions like *Gitlow v. United States*,[41] and *Whitney v. California*.[42] Although there was some movement towards Holmes's approach during this period,[43] the Court also upheld convictions of individuals based solely on their membership in the Communist Party of the United States of America (on the theory that it advocated the violent overthrow of the government).[44] However, during the 1950s, there were suggestions that the Court's approach to subversive advocacy was in transition. *Yates v. United States*[45] is illustrative of this development, but there were other similar decisions at that time.[46]

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[39] *Id.* at 630-31.

[40] *Id.* at 628.

> [T]he only object of the paper is to help Russia and stop American intervention there against the popular government—not to impede the United States in the war that it was carrying on. . . . In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them.

Id. at 629.

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[41] In *Gitlow v. United States*, 268 U.S. 652, 655 (1925), defendant was convicted of criminal anarchy based on his writings, in particular "The Left Wing Manifesto" and "The Revolutionary Age." In upholding the conviction, the Court emphasized that the statute prohibits only "language advocating, advising or teaching the overthrow of organized government by unlawful means. These words imply urging to action." *Id.* at 664-65. The Court noted that The Manifesto attempted to foment mass strikes and includes a call to action." *Id.* at 665. In rejecting defendant's free speech claims, the Court concluded that speech advocating the overthrow of the government by force, violence and unlawful means "are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power." *Id.* at 668. Unconcerned about the imminency of the harm, the Court struck a precautionary note: "a single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration," and the state "cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction." *Id.* at 669. Justice Holmes, joined by Justice Brandeis, dissented, arguing that the convictions should have been reversed on free speech grounds. Since every idea could be regarded as an incitement, he argued that government could not interfere unless the risk of harm was imminent. *Id.* at 672-73 (Holmes, J., dissenting).

[42] *Whitney v. California*, 274 U.S. 357 (1927), involved a prosecution under a state "criminal syndicalism" statute of defendant who was a member and organizer of the Communist Labor Party of America whose declared purpose was "to create a unified revolutionary working class movement in America, organizing the workers as a class, in a revolutionary class struggle to conquer the capitalist state, for the overthrow of capitalist rule, the conquest of political power and the establishment of a working class government, the Dictatorship of the Proletariat." *Id.* at 363-64. There was no evidence suggesting that she had tried to overthrow the government. The Court held that:

> [T]he State has declared, through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes, involves such danger to the public peace and the security of the State, that these acts should be penalized in the exercise of its police power. That determination must be given great weight.

Id. at 371. The Court viewed the statute as prohibiting conduct in "the nature of a criminal conspiracy," and noted that "such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals." *Id.* at 372.

[43] For example, in *De Jonge v. Oregon*, 299 U.S. 353 (1937), the Court held that expressive freedom could not be abridged without an incitement to violence and crime.

Likewise, in *Herndon v. Lowrey*, 301 U.S. 242 (1937), the Court found that speech could not be punished merely because it had a dangerous tendency.

[44] *See* Dennis v. United States, 341 U.S. 494 (1951). In that case, defendants were prosecuted under the Smith Act for organizing the Communist Party of the United States of America because it teaches and advocates the overthrow and destruction of the Government of the United States by force and violence, and they knowingly and willfully advocated and taught "the duty and necessity of overthrowing and destroying the Government of the United States by force and violence." *Id* at 497. A plurality of the Court held that government need not "wait until the *putsch* is about to be executed," and inquired only "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 509-10. The Court refused to inquire into the "the probability of success, or the immediacy of a successful attempt," but concluded that the government may intervene if it "is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit." *Id.* at 509. The Court inquired only whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 510. "It is the existence of the conspiracy which creates the danger. If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added." *Id.* at 511.

[45] 354 U.S. 298 (1957). In *Yates*, the Court reinterpreted *Dennis* to require proof of the "advocacy to action" requirement that Justices Douglas and Black had urged on the Court in their *Dennis* dissents. *Id.* at 319-22. In *Yates*, Communist Party leaders were convicted of conspiracy and sentenced to five years in prison. *Id.* at 302. The Court reversed and ordered a retrial, viewing the Smith Act as focused on the "advocacy and teaching of concrete action for the forcible overthrow of the Government, and not of principles divorced from action." *Id.* at 319-20.

[46] Four years after *Yates*, in two companion cases, the Court applied the *Yates* standard to reinterpret *Dennis* as applied to the "membership" provision of the Smith Act. In *Noto v. United States*, 367 U.S. 290 (1961), the Court held that the evidence was insufficient to show:

> some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it.

Id. at 298. In *Scales v. United States*, 367 U.S. 203 (1961), the Court approved a jury instruction that required proof that the defendant was an "active" member of the

II. THE *BRANDENBURG* DECISION

In *Brandenburg v. Ohio*,[47] Justice Holmes's argument for an immediacy requirement finally prevailed. The case arose during a period of anti-Vietnam War protests, as well as a period of unrest regarding racial issues. *Brandenburg* involved a Ku Klux Klan leader who was convicted under Ohio's Criminal Syndicalism statute, which made it a crime to "advocat[e] the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" or to "voluntarily assembl[e] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."[48] He was sentenced to one to ten years' imprisonment and fined $1,000 for his activities during a Ku Klux Klan "rally" held at a farm in Hamilton County. Videotapes of the rally revealed a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood that was worn by the speaker in the films. The film also showed twelve hooded figures, some of whom carried firearms, who were gathered around a large wooden cross, which they burned. Although most of the words uttered during the rally were incomprehensible, the video included remarks that were derogatory of Negroes and Jews. Other scenes showed Brandenburg, in Klan regalia, giving a speech,[49] and also showed six hooded fig-

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Communist Party, and not merely that he was "a nominal, passive, inactive or purely technical," and it also sought proof that he intended "to bring about violent overthrow 'as speedily as circumstances would permit.'" *Id.* at 219.

[47] 395 U.S. 444 (1969).

[48] *Id.* at 444-45 (quoting OHIO REV. CODE ANN. §2923.13).

[49] *Id.* He stated:

> This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken. We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.

ures, including Brandenburg, who gave a speech that was very similar to the other speech, but which included the following statement: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel."[50] Although some of the figures at the rally carried weapons, Brandenburg did not.

Despite Brandenburg's inflammatory statements and the violent history of the KKK, the Court overturned Brandenburg's conviction. The Court held that the mere fact that a speaker advocates violent methods for the achievement of political and economic change does not involve "such danger to the security of the State that the State may outlaw it."[51] The Court then articulated the two-prong *Brandenburg* test:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[52]

The Court noted that "'the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.'"[53] Since the Ohio statute failed to draw this distinction, the Court concluded that it "impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments," and "sweeps within its condemnation speech which our Constitution has immunized from governmental control."[54] In other words, the statute failed to adequately distinguish between "mere advocacy" and "incitement to imminent lawless action."[55]

Justice Douglas concurred, arguing that using the "clear and present danger" to "crush what Brandeis called '[t]he fundamental right of free men to strive for better conditions

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Id. at 446.

[50] *Id.* at 447.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 448 (citation omitted).

[54] *Id.*

[55] *Id.* at 448-49.

through new legislation and new institutions' by argument and discourse even in time of war" was dangerous.[56] He concluded, quoting Justice Holmes's dissent in *Gitlow*:

> Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. . . . Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration.[57]

The requirement of imminence has been reaffirmed in other decisions.[58]

III. *BRANDENBURG* IN THE CYBER-VILLAGE

How should *Brandenburg* apply to Internet communications? As noted, the Internet has transformed the nature of communication by allowing ordinary individuals to freely communicate their ideas. Although illegal advocacy can still be presented in speeches (as in *Debs* and *Brandenburg*) or printed circulars (as in *Schenck*), it can be more easily and widely disseminated through the Internet. Indeed, using modern technologies, it is extremely easy to circulate subversive advocacy through Internet websites, blogs, e-mails or listservs.

Should this "ease of access" affect the Court's analysis? *Brandenburg* was formulated to apply to a speaker who was trying to whip a crowd into a frenzy. In that context, society might have a legitimate basis for restraining a speaker who intends to incite imminent lawless conduct, and who is in the process of doing so at that very moment. By restraining the speaker, society might hope that discourse would prevail, and that grievances might be resolved through speech or through ordinary political processes. By contrast, at first glance, it may not seem obvious that the *Brandenburg* test can be meaningfully applied to communications posted on the Internet. For example, consider Eugene Debs's campaign speech or Schenck's circular, and assume that they are posted on an Internet website (or sent through the Internet via e-mails or listservs) rather than delivered at a campaign rally or communicated through the distribution of printed circulars. One might argue that neither the modern Debs nor the modern Schenck intended to incite *imminent* lawless conduct. The requirement of imminence suggests a higher level of immediacy, and it is not clear that many Internet publications are *likely* to cause *imminent* lawless conduct. Internet publications have led to violence (e.g., the posting of the Danish cartoons[59]), but often the reaction is usually more delayed. As a result, if *Brandenburg* is strictly applied, one might suspect that it would be difficult to prosecute the modern Debs or Schenck.

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[56] *Id.* at 452 (citation omitted).

[57] *Id.*

[58] For example, in *Hess v. Indiana*, 414 U.S. 105 (1973), the Justices disagreed about whether the alleged harm was imminent, but a plurality voted to reverse Hess's conviction for disorderly conduct. During an anti-war demonstration at Indiana University, protestors blocked access to a public street. *Id.* at 106. As police began to clear the street, Hess was arrested for saying "fuck" to a police officer, and he uttered either "We'll take the fucking street later," or "We'll take the fucking street again." *Id.* at 107. The plurality concluded that, "At best, however, the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to permit the State to punish Hess's speech." *Id.* at 108.

However, analysis of Internet issues might not be as obvious as would initially appear. By using the Internet, the modern Debs and Schenck have much greater ability to reach and influence sympathetic or interested individuals. When Eugene Debs and Schenck spoke during the early part of the last century, communications possibilities were far more circumscribed. While Debs could speak at a campaign rally, or Schenck could hand out printed circulars, their ability to reach a wider audience was limited by the nature of their medium. Of course, both Debs and Schenck could have tried to resort to more "modern" technologies such as radio or television. However, unless they owned newspapers, printing presses, or radio and television stations, they would have been forced to go through gatekeepers (e.g., the owners or program directors of the newspapers, printing presses, or stations) in order to access those technologies. Since both of their views would have been controversial for the time, and potentially inflammatory, it is not clear that the gatekeepers would have allowed them to access radio, television or newspapers to propagate their views.

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[59] *See* Craig S. Smith & Ian Fisher, *Temperatures Rise Over Cartoons Mocking Muhammad*, N. Y. TIMES, Feb. 3, 2006, at A3.

The Internet completely redefines the ability of the modern-day Debs and Schenck to communicate their ideas to potential followers. If they wish to circulate their ideas through newspapers, radio or television, they are still subject to gatekeepers who can thwart or limit their attempts to communicate. However, there is nothing to prevent the modern Debs or Schenck from ignoring traditional media altogether and circulating their ideas over the Internet. Through that medium, they have many communications forms available to them (e.g., websites, blogs, Twitter, Facebook), and they can quickly and efficiently transmit their ideas around the country, as well as around the world. Moreover, they can do so at relatively little cost.

The Internet also provides the modern-day Debs and Schenck with the ability to efficiently contact like-minded individuals. Indeed, one of the distinguishing features of the Internet is that it allows individuals (whether they are interested in anarchy or opposition to war, or for that matter, to old cars or whatever) the ability to virtually "congregate" and virtually "communicate." As a result, the potential threat to society is much greater. It is one thing when anarchists, Ku Klux Klan members, (American) Nazi party members, or white supremacists meet in small dingy basements or distribute circulars. It is quite another thing when they use the Internet to quickly and easily transmit their ideas to those of similar bent. Moreover, since the Internet enhances the ability of individuals to meet like-minded people, it likewise enhances their potential to engage in conspiracies, including potentially broad conspiracies.

At the same time, the Internet makes it easier for law enforcement officials to track subversive advocates and extremist groups. When someone posts information on a blog or website, it is often available for the entire world to access and view. As a result, enforcement personnel may have the ability to observe what anarchists, terrorists, white supremacists, or others are saying, and to track their movements. Likewise, enforcement personnel have greater capacity to intervene when individuals cross the line from advocacy to conspiracy and action. Indeed, enforcement personnel can surreptitiously infiltrate terrorist groups and other potentially dangerous organizations using anonymous handles. As a result, it is not clear that the Internet requires any alteration in the *Brandenburg* formulation.

Of course, courts have always retained the right to prosecute individuals who engage in criminal conspiracies or who solicit others to commit crimes, but there has always been some discomfort between the crimes of solicitation and conspiracy law and the First Amendment. Under the crime of conspiracy, individuals can be prosecuted for conspiring to commit a criminal act, and of course the crime necessarily involves some form of speech in the sense that the conspirators agree (either explicitly or by their conduct) to commit a crime.[60] Under the crime of solicitation, an individual can be prosecuted for soliciting another to commit a criminal act, and speech can also be involved in the sense that the crime is solicited.[61] In the early subversive advocacy cases (e.g., *Schenck*), many of the prosecutions were for crimes that involved conspiracy or the equivalent of solicitation. However, the speech was not in the nature of conspiracy, and could more appropriately be characterized as political rhetoric, inflammatory rhetoric, perhaps, but political rhetoric nonetheless. In the early cases, as previously discussed, courts had difficulty determining when the line between political rhetoric and criminal action had been crossed.

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[60] Under the Model Penal Code's conspiracy provision, MODEL PENAL CODE §5.03, a conspiracy is defined as follows:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he: (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

[61] Under the Model Penal Code's solicitation provision, MODEL PENAL CODE §5.02, the crime is defined as follows:

> A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

IV. APPLICATION OF *BRANDENBURG* TO MODERN CYBER CONTEXTS

While there will be many contexts in which the *Brandenburg* criteria shield speech from prosecution, there will also be situations when prosecution is appropriate. The ability of Internet users to reach large numbers of like-minded people creates the possibility of stimulating mass or nearly instantaneous action. For example, in Philadelphia, there have been examples of Internet-organized gatherings of people that are coordinated through social networking sites.[62] Although these events began as a form of performance art, or even involved such silly things as pillow fights, the events have sometimes evolved into violence.[63] As a result, one can argue that the *Brandenburg* test might be satisfied for some of these Internet-organized gatherings. For example, suppose that a modern-day Schenck issues an Internet call for "all able-bodied men and women" to convene on the Army induction center (assuming, as well, that there is a draft), and calls on them to use "any and all means" to obstruct entry into the center. If there is reason to believe that this call to action will produce an immediate response from a group of people, then it might be said that Schenck intended to incite imminent lawless conduct, and that his Internet communication was likely to produce such conduct.

However, application of the *Brandenburg* test may make prosecution more problematic in some other cases. For example, some Internet pedophilia cases will be subject to prosecution, such as when an individual tries to arrange to have sex with a child through the Internet. Under such circumstances, a prosecution for solicitation and (possibly) conspiracy may be entirely appropriate. Other cases are not so easy to resolve. For example, there has been much debate about the pedophile (Jack McClellan) who explicitly discusses and encourages pedophilia on his website, and refers to his interest in little girls.[64] Despite public outrage over the content, First Amendment scholars have expressed doubts about whether the website can be banned.[65] Obviously, society can try to deal with individuals like McClellan through private means (e.g., in McClellan's case, his Internet service provider decided to close down his website).[66] In addition, to the extent that someone like McClellan poses a real threat to children, a judge can enter appropriate orders, or the police can intervene. In McClellan's case, a judge entered an order prohibiting him from coming close to certain areas where children gather.[67] As a result, by resorting to the Internet, McClellan alerted the community (both parents and law enforcement officials) to his presence, allowed them to take appropriate action, and encouraged them to be more vigilant. In the final analysis, there is some value to *encouraging* rather than *discouraging* such disclosures so that society can be more vigilant regarding folks like McClellan.[68]

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[62] *See* Ian Urbina, *Mobs are Born as Word Grows by Text Message*, N.Y. TIMES, Mar. 25, 2010, at A1.

[63] *Id.*

The same is true of the actual *Schenck* case when it is shifted to the Internet—if we transport Schenck from World War I into the modern era, and assume that he is propagating his ideas over the Internet. Of course, we must also assume that the country is at war and that there is a military draft. If Schenck makes the same arguments that he made during World War I (that young people should resist the draft), it can be argued that his language is really more in the nature of rhetoric and argument, and one might raise questions about whether the rhetoric is likely to provoke an immediate response. Certainly, absent a response to the rhetoric, there is no conspiracy in the sense that there is no evidence that anyone actually agreed with him to resist the draft or that the rhetoric had any effect whatsoever. Although Schenck might be able to use the Internet to reach more people than he did through his circulars, and he might be able to reach more people that are prepared to take action, it is not necessarily clear that anyone will take any action. Of course, if folks do respond and Schenck conspires or is complicit in illegal action, law enforcement intervention might be more appropriate. Moreover, as with pedophile McClellan, the Internet makes it easier for the police to watch and observe Schenck's movements, and to intervene when Schenck crosses the line from political discourse to conspiracy or action.

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[64] *See supra* note 9 and accompanying text.

[65] *See id.*

[66] *See* Debra Meyers, *Pedophile Jack McClellan Leaving California*, DIGITAL J., Aug. 27, 2007, http://www.digitaljournal.com/article/221125.

[67] *See* Beth Barrett, *Judge Imposes 30-Foot Buffer; Pedophile Ordered to Avoid Kids' Spots*, DAILY NEWS, Aug. 25, 2007, at N1.

[68] On the same theory, there is some benefit to allowing the KKK, American Nazis, and other extremist groups to hold public marches. Do we really want them meeting in dingy basements out of public view? If they enter the public domain, they make their identities known, and it becomes easier for law enforcement personnel to track them.

A bit more disturbing example (even, perhaps, more than the McClellan case) is the case of Johnny Logan Spencer, Jr., a white supremacist who was criminally indicted for publishing a poem on the Internet entitled "The Sniper."[69] The poem, which he placed on a neo-Nazi website, refers to the assassination of a black president, and contains the words "DIE negro DIE."[70]

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[69] *See supra* note 10.

[70] *Id.* The poem reads as follows:

THE SNIPER

As the tyrant enters his cross hairs the breath he takes is deep
His focus is square on the target as he begins to release
A patriot for his people he knows this shot will cost his life
But for his race and their existence it is a small sacrifice

The bullet that he has chambered is one of the purest pride
And the inspiration on the casing reads DIE negro DIE
He breathes out as he pulls the trigger releasing all his hate
And a smile appears upon his face as he seals that monkey's fate

The bullet screams toward its mark bringing with it death
And where there was once a face there is nothing left
Two blood covered agents stare in horror and dismay
Looking down toward the ground where their president now lay

Now the screams of one old negro broad pierces thru [sic] the air
Setting off panic from every eyewitness that was there
And among all the confusion the hero calmly slips away
Laughing for he knows there will be another negro holiday

Spencer used the moniker "Pain1488" which some claim refers to white nationalism and also pays homage to Hitler.[71] Spencer was charged with threatening the life of the President, a crime that carries a penalty of up to five years in prison and a $250,000 fine.[72]

Although *Brandenburg* does not require the presence of a call to action by the defendant, it is worthwhile to note that none was made by Spencer. The poem is purely descriptive. Moreover, it is not clear that one can say that Spencer's poem is likely to incite imminent lawless conduct. There was no evidence of any response to the poem when the poem was first posted on the Internet in 2008,[73] and there is no evidence that any actions were taken in response to it.[74] Moreover, the evidence suggests that Spencer himself did not even own a gun.[75] So, the poem might be regarded as nothing more than "political hyperbole" rather than a direct call to break out the pitch forks and torches (or more accurately, the assassin's weapons). If *Brandenburg* is strictly applied, there is probably very little chance of convicting Spencer for posting his poem "The Sniper" on the Internet.

Of course, in the subversive advocacy cases, context matters. On the government's behalf, one must remember that President Obama is the first black President. When one considers the history of racial tensions in the United States, including the Ku Klux Klan's attacks on blacks in the old South,[76] the threat might seem more credible and imminent. It is also important to emphasize that the poem was posted on a white supremacist website, and one might expect some sympathy

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By Johnny Spencer

Criminal Compl. at 1-2, United States v. Spencer, No. 3:10-mj-00054-DW (W.D. Ky. Feb. 17, 2010) (Affidavit of Secret Service Agent Stephan M. Pazienza); *see also* Brett Barrouquere, *Ky. Man Charged with Threatening Obama in Web Poem*, ASSOCIATED PRESS, Feb. 20, 2010.

[71] *See* Barrouquere, *supra* note 70.

[72] *See supra* note 10.

[73] *See* Criminal Compl., *supra* note 70, at 1-2.

[74] *See* Barrouquere, *supra* note 70.

[75] *Id.*

[76] *See* Virginia v. Black, 538 U.S. 343 (2003).

among Spencer's audience for his sentiments, and the possibility that the poem will motivate some readers to violence. The difficulty, as noted, is that the poem was originally posted on the website in 2008, and there is no evidence that it prompted any violence during the intervening years. If the poem was going to serve as a catalyst for violence, one would have expected violence (or attempted violence) in the long period between the original posting and Spencer's arrest.

It is also difficult to charge Spencer with conspiracy or solicitation. There is no evidence that Spencer conspired with anyone to kill, harm or threaten the President. In addition, the poem does not seem to involve solicitation. Spencer simply lays out a story, albeit a very troubling scenario, and does not exhort anyone to do anything. Sure, the poem may plant ideas in the heads of some white supremacists, but it is hardly an attempt to solicit others to assassinate the President.

As a result, if Spencer is going to be convicted, it must be under the criminal statute that makes it a crime to make true threats against the President of the United States.[77] Even though this statute criminalizes speech, the statute has been upheld given the nation's compelling interest in protecting the life of the President.[78] Indeed, in the Spencer case, the government is relying directly on that doctrine.[79] The difficulty is that the government must show that the defendant actually made a "true threat" as opposed to engaging in political rhetoric. In

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[77] 18 U.S.C. §871(a) provides:

> Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined under this title or imprisoned not more than five years, or both.

[78] *See Black*, 538 U.S. 343.

[79] *See* Barrouquere, *supra* note 70 (Assistant U.S. Attorney Phillip Chance, the prosecutor in the case, stated, "This is a threat by an individual against an individual because of who he is . . . . He is the president and he is black.").

Watts v. United States,[80] the Court overturned Robert Watts's conviction under the statute for an incident that occurred in 1966 during a public rally on the grounds of the Washington Monument. During the rally, participants divided into small discussion groups and Watts joined a group that was focused on the issue of police brutality. During the discussion, Watts made the following statements (which were overheard by an investigator for the Army Counter Intelligence Corps):

> And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers.[81]

In reversing Watts's conviction, the Court concluded that the statute on which the conviction was based was valid, because the country has an "overwhelming" interest in protecting the life of the President, as well as in protecting him against threats of physical violence. The Court, however, distinguished between "threats" and "constitutionally protected speech."[82] The Court dismissed Watts's comments as nothing more than "political hyperbole,"[83] and went on to note that the "language of the political arena [is] often vituperative, abusive, and inexact." The Court dismissed Watts's statements as nothing more than "a kind of very crude offensive method of stating a political opposition to the President."[84] In subsequent cases, the lower federal courts have tried to draw a line between "true threats" and political hyperbole,[85] not always successfully.[86] As a result, it is not clear that Spencer made a "true threat" against the life of President Obama.

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[80] 394 U.S. 705 (1969).

[81] *Id.* at 706.

[82] *Id.* at 707-08.

[83] *Id.* at 708.

[84] *Id.* The Court also cited and relied on its holding in *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), for the proposition that the language must be interpreted "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

[85] *See* United States v. Pinkston, 338 F. App'x 801 (11th Cir. 2009) (upholding Pinkston's conviction for threatening to murder the President).

CONCLUSION

In developing the *Brandenburg* approach to subversive advocacy, the United States Supreme Court took a long and tortuous path that lasted for more than half a century. In a series of decisions rendered during the first half of the twentieth century, the Court struggled to find a suitable balance between political rhetoric and criminal acts, and often did not succeed in striking an appropriate balance. For example, a presidential candidate was sentenced to prison for rhetoric that he used in a campaign speech. Other individuals were convicted for speech that did not amount to conspiracy or solicitation, and did not seem to have any discernible effect on potential listeners. Individuals were also sentenced to prison for membership in political organizations (albeit organizations with more extremist views). *Brandenburg* took the Court in a very different direction and placed a premium on immediacy. A defendant could not be convicted of subversive advocacy unless it could be shown that he intended to incite imminent lawless conduct, and that his speech was likely to incite imminent lawless conduct.

Since *Brandenburg* was developed during a period when most subversive advocacy was delivered through speeches or printed circulars, the imminency requirement may have made more sense as applied to those methods of communication. Society has a legitimate concern in preventing a speaker from whipping a crowd into a lawless frenzy. The Internet is quite different because, even though that technology provides for instantaneous communication, it rarely stimulates immediate mob action. Of course, the Internet does allow an individual to communicate more broadly, and to reach more like-minded people. As a result, there is a risk that Internet communications will stimulate more discussions of illegal activity, and

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[86] *See* United States v. Lincoln, 403 F.3d 703 (9th Cir. 2005) (reversing Lincoln's conviction for allegedly making a "true threat" against President Bush).

therefore perhaps lead to a higher level of violence and subversive activity. Indeed, as the Philadelphia text-messaging example suggests, it may be possible for Internet-based communications to produce immediate lawless action. As a result, even under *Brandenburg*, prosecution may be appropriate. At the same time, the Internet allows for enhanced law enforcement surveillance of communications, and therefore may give the government greater capacity to observe and intervene.

Because the Internet allows individuals to freely cross international borders, an international response to the problems of the Internet would be desirable. Indeed, since the Internet allows individuals to transmit their messages so freely across international borders, an international response might be the only truly effective way to regulate the Internet. At the same time, because different societies approach legal issues from such different perspectives, it is sometimes difficult to find common ground. Or, to put it another way, formulating an international response to the Internet is difficult because fundamental societal values are at stake, and there is little agreement between countries about how to resolve the tension between competing values. For example, even though countries like France and Germany prohibit Holocaust denial, the United States does not (and probably cannot) impose criminal restrictions on Holocaust denials because of the First Amendment to the United States Constitution's guarantee of free speech.[87] As a result, it may be difficult or impossible to formulate a comprehensive treaty dealing with Internet regulation of subversive advocacy. The best that can be done is to identify issues on which common ground can be found, and jointly attack those issues.

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[87] *See id.*

PERVASIVE SURVEILLANCE AND THE FUTURE OF THE FOURTH AMENDMENT

Russell D. Covey[*]

Fourth Amendment law is at a crossroads. It traditionally has sought to balance two critical objectives: the protection of individual privacy, and the need to permit the state the necessary means to solve crimes, keep order, and safeguard the national security. Increasingly, however, it seems to do neither. In recent decades courts have construed privacy under the Fourth Amendment so narrowly and formalistically that real privacy protection seems deeply threatened. At the same time, courts have struggled to adapt traditional doctrines in light of new terrorism threats. Technological change, moreover, which already is poorly accommodated in the case law, threatens to accentuate these trends in two respects. First, rapid advances in technology continue to increase the technological power available to individuals while decreasing its costs. For example, Moore's law has, at least to date, accurately predicted that the number of transistors that can be crammed onto a computer chip will double approximately every eighteen to twenty-four months.[1] The so-called "Carlson Curve" forecasts that the cost of synthesizing DNA falls at a similar geometric rate, a prediction that to date has also proved accurate.[2] Similar phenomena have been observed in other areas of technology, while the growth of the internet has sparked a diffusion of information and technology across the globe. These developments tend to amplify each other, as increasing computer power fuels technological advances across the board, while the internet and other communications technologies efficiently distribute the new knowledge to individuals seeking it anywhere in the world.

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[*] Associate Professor, Georgia State University College of Law. Yale Law School, J.D.; Princeton University, M.A.; Amherst College, A.B.

[1] *See* Gordon E. Moore, *Cramming More Components onto Integrated Circuits*, ELECTRONICS, Apr. 19, 1965, at 114, *available at* http://download.intel.com/research/silicon/moorespaper.pdf.

[2] *See, e.g.*, Robert Carlson, *The Changing Economics of DNA Synthesis*, 27 NATURE BIOTECHNOLOGY 1091 (2009) (observing that over the past 20 years "the number of bases a single individual can synthesize in a day using commercial instruments has increased by five orders of magnitude, whereas the per base cost of synthetic genes has dropped by nearly three orders of magnitude").

The steep rise of the technology curve has radically increased the ability of ill-meaning persons to obtain highly destructive weapons.[3] The complete genetic sequence for the small-pox virus, for example, is available on the internet, and the biotechnology necessary to synthesize it can be mastered by persons with a high-school education and the equipment purchased on eBay for approximately $10,000 or less.[4] Detailed plans for building an atomic bomb are similarly available.[5] Cyber-attacks on commercial and government computer systems are prevalent and growing, and permit individual hackers as well as foreign states and terrorist groups new ways to sow disruption.[6] These technological changes place enormous pressure on governments to take increasingly intrusive measures in the name of safeguarding public security from terrorist threats. Advancing technology plainly enhances the destructive capabilities of individuals and small groups who are bent on engaging in terrorism, while the increasing complexity and interdependence of critical system infrastructure magnifies the scale of potential destruction that might result from such acts.

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[3] *See* Harvey Rishikof, *Combating Terrorism in the Digital Age: A Clash of Doctrines: The Frontier of Sovereignty – National Security and Citizenship – The Fourth Amendment – Technology and Shifting Legal Borders*, 78 MISS. L.J. 381, 385 (2008) ("Individuals have access to a potential toxic cocktail of nuclear, biological, radiological and chemical weapons that can trigger mass destruction.").

[4] *See* Rob Carlson, *The Pace and Proliferation of Biological Technologies*, 1 BIOSECURITY & BIOTERRORISM: BIODEFENSE STRATEGY, PRAC., & SCI. *5, *8 (2003), *available at* http://www.kurzweilai.net/articles/art0614.html?printable=1.

[5] *See* Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1593 (2009) (noting that "[t]he nuclear physics required to understand how to build a crude nuclear bomb has been in the public sphere for decades").

[6] *See* David E. Sanger, John Markoff, & Thom Shanker, *Cyberwar: U.S. Steps Up Effort on Digital Defenses*, N.Y. TIMES, Apr. 28, 2009, http://www.nytimes.com/2009/04/28/us/28cyber.html?_r+1&pagewan.

Governments possess only a handful of strategies, generally falling into three "buckets," to prevent the misuse of potentially destructive technologies. In the first bucket are strategies aimed at preventing malicious persons from acquiring destructive technologies through various methods of interdiction. In the second are strategies aimed at minimizing the damage that can be accomplished through the use of destructive technologies by hardening potential targets. In the third are strategies focused on monitoring the uses to which technology is put through a variety of surveillance programs. Although all three strategies—interdiction, target-hardening, and surveillance—undoubtedly need to be and no doubt will be pursued, interdiction's historic inefficacy in policing the drug and arms trades suggests that by itself it will likely prove an ineffective deterrent to future catastrophic threats. Not only is interdiction of technology itself dauntingly difficult, it risks driving marginal activities underground, where monitoring is even more difficult, and thereby inducing creation of specialized black markets for the targeted technologies.[7]

Target-hardening strategies include "making borders, buildings, airplanes, and critical infrastructures more difficult to breach, disrupt, or destroy" and vaccinating people to make them more resistant to deadly diseases.[8] Although target-hardening is imperative where possible, certain threats, including those posed by nuclear terrorism and bio-terrorism, cannot be sufficiently mitigated through target-hardening strategies. Nothing we can do will prevent a massive loss of life and material wealth in the event that terrorists succeed in detonating a nuclear weapon in a major urban area or in releasing certain deadly biological agents on a large scale.[9] Because of the inherent shortcomings of interdiction and target-hardening, surveillance will necessarily play a major, and increasing, role in safeguarding national security.

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[7] As Carlson argues with respect to proposed government controls on technologies used to synthesize DNA:

> [O]ne potential outcome of restricting access to synthesis might mirror the problem encountered by the US Drug Enforcement Agency when it cracked down on domestic methamphetamine production: information on activities the agency wished to monitor and suppress became much harder to obtain, whereas methamphetamine use continued to rise.

Carlson, *supra* note 2, at 1093.

[8] COMM. ON SCI. & TECH. FOR COUNTERING TERRORISM, NAT'L RESEARCH COUNCIL, MAKING THE NATION SAFER: THE ROLE OF SCIENCE AND TECHNOLOGY IN COUNTERING TERRORISM 28 (2002).

The government's growing need to heighten its surveillance activities is complemented by the second major consequence of technological change—the rapidly expanding power of the government to acquire and process information about persons, both home and abroad. New and increasingly powerful technologies permit the government to obtain types and quantities of information about citizens to an extent previously unimaginable. Ubiquitous closed-circuit television monitors, cellphone tracking methods, GPS devices, and electronic tolling systems permit remote, around-the-clock monitoring of an individual's location and movements. "Deep-packet" electronic surveillance methods permit digital eavesdropping of telephone and electronic communications.[10] Cyber-surveillance techniques permit access to a huge, and ever-growing, amount of information about the activities and interests of individuals, including phone and email contacts, internet searches, websites visited, purchase records, travel plans, health records, and more. New technologies make through-the-wall surveillance devices readily imaginable,[11] and through-the-clothing surveillance devices are already a fixture in many airports. Forensic biometric techniques, including DNA identification, already have revolutionized the government's ability to locate and identify human traces and promise to become ever more powerful in the future.[12] This is but a partial list of the new technologies that are already reshaping the way that government obtains information about individuals.

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[9] Vaccination programs could minimize the harms from release of some viruses or bacteria, such as smallpox, but would likely be ineffective against a wide variety of genetically-altered "supergerms."

[10] *See* Kim Zetter, *Deep-Packet Inspection in U.S. Scrutinized Following Iran Surveillance*, WIRED, June 29, 2009 (reporting concerns that Iran is using deep-packet inspection technology to "snoop on the content of e-mail, VoIP calls and other online communication" and that same technology is being installed in the United States).

[11] *See* Kyllo v. United States, 533 U.S. 27, 36 n.3 (2001) (discussing various "through the wall" surveillance devices under development by the Department of Justice).

Even more revolutionary technologies, such as nanotechnology and bio-engineering, promise to further radically expand the capabilities of government surveillance and information acquisition.[13] Experts forecast that nanotechnology will soon permit the development of detection and sensing devices that can "precisely identify, and perhaps isolate single molecules, viruses, or other complex, nanoscale structures."[14] One writer predicts "a world covered by imaging radar, multispectrum nanotech sensors, chemical sampling and a host of other data sources."[15] In that world, "tiny sensors will be designed to detect the minutest traces of chemical or biological agents or explosives. Others will be activated by the sound of voices to eavesdrop and transmit conversations."[16]

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[12] The remarkable investigative capabilities provided by these new technologies were displayed in the investigation of the recent attempted S.U.V. bombing of Times Square. Within hours of the incident, law-enforcement agents gathered hundreds of still and video images of the vehicle and suspicious activity of individuals in the vicinity at the time of the attempted bombing. Electronic toll records and images of vehicle license plates were searched in order to identify the manner by which the vehicle entered the city. Experts speculated that DNA traces would be recovered from a search of the car's interior. As a result of the investigation, a suspect was arrested while attempting to board a flight to Dubai and taken into custody within forty-eight hours of the failed attempt. *See* Michael M. Grynbaum, William K. Rashbaum, & Al Baker, *Police Seek Man Taped Near Times Sq. Bomb Scene*, N.Y. TIMES, May 2, 2010, at A1, *available at* http://www.nytimes.com/2010/05/03/nyregion/03timessquare.html?scp=1&sq=times%20square%20bombing&st=cse (reporting that "license plate readers and cameras at the area's tollbooths were being checked to determine where the car had entered Manhattan").

[13] These new technologies also promise to increase, perhaps dramatically, the destructive capabilities of ill-meaning individuals and groups. As Bill Joy, the founder of Sun Microsystems, wrote in a much-discussed article regarding twenty first century technologies such as genetics, nanotechnology, and robotics: "I think it is no exaggeration to say we are on the cusp of the further perfection of extreme evil, an evil whose possibility spreads well beyond that which weapons of mass destruction bequeathed to the nation-states, on to a surprising and terrible empowerment of extreme individuals." Bill Joy, *Why the Future Doesn't Need Us*, WIRED, Aug. 2004, http://www.wired.com/wired/archive/8.04/joy_pr.html.

[14] M.M. Crow & D. Sarewitz, *Nanotechnology and Societal Transformation*, *in* SOCIETAL IMPLICATIONS OF NANOSCIENCE AND NANOTECHNOLOGY 45, 49 (2001).

[15] William Matthews, *The New Next Generation: Emerging Technologies Will Force Change in Militaries' Mind-Set*, DEFENSE NEWS, May 25, 2009 (quoting Marvin Cetron).

These technological developments will inevitably change the landscape of Fourth Amendment law. This Article suggests how that change might occur. Part I describes the Fourth Amendment's current inability to prevent government agents from using technology to obtain information that most people would consider deeply private. It then shows how even Supreme Court decisions celebrated as enhancing privacy protection against high-tech surveillance actually provide little substantive protection, but more worrisome, also seem to erect substantial limits on the types of surveillance the government will almost certainly need to engage in to battle growing terrorism threats fueled by new technology. Part II argues that what is needed is a fundamental rethinking of the purposes animating Fourth Amendment law, and a shift in focus from privacy protection understood as permitting citizens to keep some stock of information secret from governmental inquiry to privacy protection as regulation of the use of information about citizens in ways that permit citizens to lead lives secure in the knowledge that the information will not be misused or disclosed to persons who are not entitled to it. It then suggests two ways to update Fourth Amendment jurisprudence. First, it advocates abandonment of the so-called third-party doctrine and expansion of the definition of what constitutes a search for Fourth Amendment purposes. Second, it argues for recognition of an anti-terrorism exception that would exempt anti-terrorism surveillance from the probable cause and warrant requirements, coupled with far more stringent regulation of the use of information obtained in the course of an antiterrorism, or of any special needs, search.

I. THE FOURTH AMENDMENT'S FAILURE TO PROTECT SUBSTANTIVE PRIVACY

Fourth Amendment law, as it has developed over the course of the twentieth-century, has proved singularly inept at dealing with the technological revolution. Perhaps since the Supreme Court's first landmark Fourth Amendment decision *Boyd v. United States*,[17] and certainly since *Katz v. United States*,[18] the Fourth Amendment has purported to regulate and control the non-consensual governmental acquisition of information from individuals in the name of privacy protection. Arguably, in attempting to regulate governmental acquisition of information, Fourth Amendment law has focused on the wrong problem[19] and has failed to solve that problem to boot. Notwithstanding this supposed aim, as numerous commentators have explained, Fourth Amendment law does a terrible job of protecting privacy in ways that make a difference in the modern world.[20] Weak privacy protection can largely be traced to the so-called "third party doctrine," which permits the government to obtain an enormous amount of information about individuals under the rationale that information voluntarily disclosed to a third-party is no longer reasonably held "private."[21] As a result, the government can deploy an undercover agent wearing a wire and tape recorder into an individual's home,[22] obtain cancelled checks, deposit slips, and other financial data from his bank,[23] subpoena telephone records,[24] surreptitiously track his movements throughout the day using an electronic tracking device,[25] rifle through his trash,[26] and fly a helicopter over his property[27] without any need to comply with the Fourth Amendment's traditional probable cause and warrant requirements. It is hardly an overstatement to say that, by removing from privacy protection any information revealed to others, the Fourth Amendment's function as guarantor of individual privacy has been crippled. In an increasingly networked and technology-dependent world, the amount of information that has not been deposited with, or at least casually-exposed to, some other commercial, governmental, or corporate entity is miniscule and shrinking.[28]

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[16] *Id.*

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[17] 116 U.S. 616 (1886).

[18] 389 U.S. 347 (1967).

[19] For one commentator making this argument, see Scott Sundby, *"Everyman" 's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1758 (1994) ("[F]ormulating Fourth Amendment interests in privacy terms has undermined the Amendment's protections.").

[20] The classic article criticizing the third-party doctrine for its disregard of privacy between persons is Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593 (1987); *see also* Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment After* Lawrence, 57 UCLA L. REV. 1, 3 (2009) (arguing that third-party doctrine undermines privacy and liberty).

[21] *See* Stephen E. Henderson, *Beyond The (Current) Fourth Amendment: Protecting Third-Party Information, Third Parties, and the Rest of Us Too*, 34 PEPP. L. REV. 975, 976 (2007) (defining third-party doctrine as "meaning that so far as a disclosing party is concerned, information in the hands of a third party receives no Fourth Amendment protection").

[22] United States v. White, 401 U.S. 745 (1971) (permitting undercover agents to wear wires and tape recorders).

[23] *E.g.,* United States v. Miller, 424 U.S. 435 (1976) (obtaining bank records).

[24] *E.g.,* Smith v. Maryland, 442 U.S. 735 (1979).

This is not to say that Fourth Amendment law sets up no barriers to police investigation. The cases do establish a small zone of privacy in a limited number of physical spaces—chiefly, the home, but also to a lesser extent, physical containers such as coat-pockets, bags, luggage, and footlockers, and to a still lesser extent, automobiles. Of these, protection of the physical integrity of the home has received special Fourth Amendment deference. That deference has been extended in two important cases to technological surveillance. In *United States v. Karo*, the Supreme Court held that while monitoring of an electronic beeper in public was permissible, monitoring an electronic beeper inside a home (or other constitutionally-protected place) was not.[29] In *Kyllo v. United States*,[30] the Court held that government use of a thermal-imaging device to measure heat radiation emitted from private residences was the functional equivalent of physical entry and therefore unlawful without a warrant.[31]

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[25] *E.g.*, United States v. Knotts, 460 U.S. 276 (1983) (obtaining information from an electronic beeper).

[26] *E.g.*, California v. Greenwood, 486 U.S. 35 (1988).

[27] *E.g.*, Florida v. Riley, 488 U.S. 445 (1989) (permitting warrant based on surveillance obtained by aerial overflight).

[28] *See* Susan W. Brenner, *The Fourth Amendment in an Era of Ubiquitous Technology*, 75 MISS. L.J. 1, 68 (2005).

[29] 468 U.S. 705 (1984).

[30] 533 U.S. 27 (2001).

[31] *Id.* at 40. Similar limits on government's ability to search or seize have been recognized outside the home as well. In *Florida v. J.L.*, the Supreme Court significantly limited the ability of police officers to investigate uncorroborated anonymous tips, even

Although these cases do impose some restraints on police surveillance, at least on the actual facts of the cases, the limitations on police information-gathering tactics do not appear well-designed to protect privacy in any but the most formal and abstract sense. After all, police monitoring of a beeper inside a can of ether that has been carried into a person's house reveals to the police only the fact that the beeper, and hence the can of ether, is inside the house. It tells the police nothing about the house itself, nor reveals any private information that the homeowner might seek to conceal (other than the fact that the item containing the beeper is inside the house). Of course, the valence of that narrow fact turns to an extent on the nature of the item. Possession of some items—drug paraphernalia or child pornography, for instance—might itself be compromising. Be this as it may, it was the view of the majority in *Karo* that monitoring the beeper after it had emerged from a constitutionally-protected location was permissible, even if absent the beeper police would have had no way to know that the surveilled item had been moved.[32] Any deterrent impact of the rule precluding the monitoring of a beeper inside a house is thus attenuated by the lawfulness of monitoring the movement of that item up to the threshold of the house, and then again after it leaves the house and begins its journey to the next destination. Under such a rule structure, police have been given a green light to use tracking technology, knowing that the most of the information obtained thereby will ultimately be admissible. As a result, *Karo* offers individuals little meaningful privacy protection.

Similarly, despite all the talk of revealing the secrets of the lady of the house and her daily sauna and bath in *Kyllo*,[33]

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when investigation of the tip posed relatively minor intrusion on the suspect, where there were few practical alternatives available to the police, and where the threat reported—a teenager unlawfully in possession of a gun—was not insignificant. 529 U.S. 266, 274 (2000).

[32] *Karo*, 468 U.S. at 721 (holding that unlawful monitoring of beeper while it was located in private residence did not taint subsequent monitoring of beeper when item was moved out of residence, even though the movement of the item was otherwise undetected).

[33] *Kyllo*, 533 U.S. at 38; *id.* at 44, 50 (Stevens, J., dissenting).

the tactic employed by the police in pointing a thermal-imaging device at Kyllo's residence implicated privacy to, in the words of Justice Stevens, at most a "trivial" degree.[34] What privacy interest could an individual have in the relative distribution of heat being emitted from her home? Compare that with the trash searches at issue in *Greenwood*, which were held not to implicate Fourth Amendment concerns. Unlike a thermal imager scan, a trash search can reveal an enormous amount of truly private information, including love letters, political correspondence, financial records, medicines, and evidence of sexual practices. Contrasting *Karo* and *Kyllo* with third-party doctrine cases like *Greenwood*, it is clear that the Court has privileged a formalistic understanding of privacy as "information about the home" over a substantive understanding of privacy as information that an individual reasonably would prefer not to disclose to strangers. Of course, in both *Karo* and *Kyllo*, the Court was quite clearly less concerned with redressing any actual privacy intrusion that occurred in the cases before them than it was with anticipating the use or development of new technologies that might reveal more intimate facts. While a beeper reveals no more than its present location, an electronic listening device or small camera might well reveal all sorts of information about the home and its occupant's activities which the homeowner reasonably expects to keep private. The *Kyllo* Court was quite explicit about this, expressly crafting a rule not merely for the case before it but in anticipation of potentially more intrusive technologies.[35] But given the types of technology actually used, it is hard to see how either *Karo* or *Kyllo* provides much real privacy protection.[36]

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[34] *Id.* at 45 (Stevens, J., dissenting).

[35] *See id.* at 35-36 (majority opinion) (explaining that an alternative rule "would leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home" and that "the rule we adopt must take account of more sophisticated systems that are already in use or in development").

[36] The same might be said of another recent pro-privacy protection Fourth Amendment decision, *Bond*, which held unlawful government agents' warrantless and suspicionless prodding of luggage in the overhead storage bin of a bus. Like *Kyllo* and *Karo*, the information disclosed by the unlawful search in *Bond* seems rather innocuous (whatever can be felt by prodding and squeezing a closed piece of luggage) and the

These decisions, however, are almost as perverse in their potential effects on limiting legitimate government surveillance tactics as the third-party doctrine has been in eradicating personal privacy. Not only do the Fourth Amendment barriers erected in these cases provide relatively little substantive privacy protection to individuals, but they seem impractical, if not positively dangerous, in light of potential terrorist threats in a future promising ever-cheaper and more powerful technologies deployable for destructive purposes. Consider two potentially valuable anti-terrorism tactics that these cases seem to foreclose: the use of electronic tags and microscopic sensors that might be embedded into physical objects, and the use of imaging and scanning devices that might be used remotely or directly by government agents to detect various phenomena.

There are a huge variety of new electronic tagging systems and devices coming online. As noted above, some of these devices are being engineered at the nanoscale, and promise to permit very selective search, identification, and tracking tactics. In addition, Radio Frequency Identification ("RFID") technology is already widely used to monitor the movement of goods in a variety of ways, and has even been used to implant identification information in the human body.[37] It is easily conceivable that efforts to control the diffusion of powerful bioengineering technologies that have widespread legitimate commercial and scientific uses as well as the potential to manufacture biological weapons of mass destruction might incorporate RFID or other tracking technologies that monitor the location and use of biotech equipment. *Karo*'s rule that monitoring the location of such equipment is unlawful when it intrudes into constitutionally-protected spaces, including homes or private businesses, seems to call such precautionary surveillance into question.

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holding driven less by an actual concern with protecting privacy and more with a general distaste for a particular police information-gathering tactic.

[37] *See* Jennifer E. Smith, *You Can Run, But You Can't Hide: Protecting Privacy From Radio Frequency Identification Technology*, 8 N.C. J.L. & TECH. 249, 256, 260-61 (2007) (noting readiness of RFID technology for deployment on "massive scale", including for tracking purposes on bracelets and in implants in human bodies).

Kyllo's holding, well-meaning as it is, seems even more obviously problematic in the age of terrorism. Devices designed to sense the presence of nuclear, chemical, or biological materials, including both nanotech sensors and scanning devices that might be used to detect the signature traces of chemical, biological, or nuclear materials would be tremendously helpful in preventing the deployment of Weapons of Mass Destruction ("WMD") in major urban areas.[38] *Kyllo*'s rule, however, on its face seems to preclude their use, at least as long as those technologies are not "in general use."[39]

The gravity of the threat posed by WMD, made or hidden in private residences, suggests that a Fourth Amendment jurisprudence that constructs a relatively impermeable wall around the home or any other "constitutionally-protected area" is imprudent and potentially disastrous. Although a long line of Supreme Court cases have reiterated the principle that the home must remain impervious to unregulated governmental intrusion,[40] the proliferation of destructive technologies and the increasing ease of manufacturing them will continually increase the hazards of placing off-limits any physical locations to preventative surveillance efforts by the state.[41]

In short, Fourth Amendment law has utterly failed to develop sensible rules in response to changing technology. By focusing on the protection of "privacy" defined as keeping information about activities occurring within a small set of specially-protected areas secret from government observation, the Fourth Amendment has wandered down the wrong path. Because most intimate activities involve limited disclosures of information to others, Fourth Amendment law already fails to protect privacy in a sense meaningful to most persons, even while it continues to bar the state from engaging in some activities that might measurably advance anti-terrorism efforts. Meanwhile, future technological developments will increase the threat of major acts of terrorism, the number of persons or groups who will have the means to engage in such terrorism will multiply, and the government's capability to engage in surveillance and its interest in deploying highly intrusive surveillance systems will grow ever stronger.

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[38] This point was made by Justice Stevens in his dissent in *Kyllo*. *See* 533 U.S. at 48 (Stevens, J., dissenting) (arguing that the Court's holding renders unconstitutional "the use of other new devices that might detect the odor of deadly bacteria or chemicals for making a new type of high explosive").

[39] *Kyllo*, 533 U.S. at 34 (majority opinion) (holding that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally-protected area' constitutes a search") (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)).

[40] *See, e.g.*, *id.* at 31 (asserting that "'[a]t the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion'") (quoting *Silverman*, 365 U.S. at 511).

[41] Imagine a nuclear device capable of obliterating a major city that could fit in a shoebox and be constructed, based on plans downloaded from the internet, using materials available at the neighborhood hardware store. How might the government respond to such a threat? How might those responses fit within our rules of constitutional criminal procedure intended to secure individuals from unreasonable government searches?

II. SHIFTING CONSTITUTIONAL SCRUTINY FROM INFORMATION ACQUISITION TO INFORMATION UTILIZATION

Contrary to the dire warnings of some privacy activists, the increasing reliance upon surveillance technologies is neither surprising nor especially alarming. Rather, as Jack Balkin observes, "[g]overnment's increasing use of surveillance and data mining is a predictable result of accelerating developments in information technology."[42] Thus, unlike many scholars who critique the law's failure to restrain the proliferation of surveillance,[43] I accept the surveillance state as an apparently inevitable concomitant of a technologically-advanced society. We cannot, and increasingly will not, live in an un-surveilled world because the risks of averting our gaze are, or likely will become, too great.

Because of the ever-increasing threat to public safety posed by evolving technology, both law and society must learn to accommodate a regime of pervasive surveillance. That is, government must be permitted to obtain the information it needs to keep its citizens and infrastructure secure. Individual privacy cannot continue to be conceptualized as the right or expectation to maintain one or more physical locations that are immune from all forms of surveillance because any absolute location-based prohibitions on the government's ability to surveil will inevitably be exploited by those seeking to inflict harm. Transitioning to a constitutional surveillance state, however, will require careful rethinking about the basic purposes of Fourth Amendment law.

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[42] Jack M. Balkin, Essay, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 3 (2008).

[43] *See, e.g.*, Christopher Slobogin, *Transaction Surveillance by the Government*, 75 MISS. L.J. 139 (2005).

If I am right that pervasive surveillance will become the norm, then the problem for constitutional criminal procedure must necessarily shift from the regulation of the state's acquisition of information to the regulation of the state's use and dissemination of that information. Such an argument might seem radical because the Fourth Amendment bars unreasonable searches and seizures—which are methods of bringing information, property, and people into governmental custody or control—but says nothing on its face about the governmental use of information, however obtained, that is already in its possession. But the argument is less radical, I would argue, than it might at first glance seem. The exclusionary rule, long an accepted, if contested, element of Fourth Amendment doctrine, designedly addresses the legitimate and illegitimate uses of evidence and information in the state's possession.[44] Similarly, the Court has considered the use of evidence as one factor in evaluating the reasonableness of a search. For example, the exemption from full Fourth Amendment scrutiny of searches and seizures that are not primarily directed at enforcing the criminal law is logically grounded in the view that use of information matters.[45] That proposition is undercut to some extent by the plain view doctrine that permits information that otherwise wouldn't have been available to the government to be used for criminal prosecution as long as it was otherwise lawfully obtained.[46] Still, the fact that the state's purpose in acquiring information often determines the lawfulness of the acquisition suggests that use, as well as acquisition method, is a subject of constitutional import.

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[44] Of course, what makes the exclusionary remedy so controversial is that while it regulates the government use of some information, it prohibits seemingly legitimate uses of that information—to prosecute criminals—at a significant cost to the public interest.

[45] *See, e.g.*, Indianapolis v. Edmond, 531 U.S. 32, 42 (2000) (finding that checkpoint program designed to interdict drugs was unlawful because its "primary purpose" was "to uncover evidence of ordinary criminal wrongdoing").

In short, any easing of constitutional restrictions on government's ability to acquire the information necessary to combat terrorism will necessitate new safeguards to ensure that government neither misuses that information in ways that cause real privacy harms to individuals nor abuses its enormous surveillance powers for pretextual ends. The concern with preventing governmental misuse of information will require strict regulation of the uses to which anti-terrorist surveillance data can be put.

A. Regulating Use of Surveillance Data

One of the fundamental flaws of the Court's focus on information acquisition is that it exaggerates the importance of the search/non-search dichotomy. An investigatory tactic deemed not to constitute a search is subject to no constitutional regulation at all, while a tactic that is deemed a search is subject to close constitutional scrutiny. Undoubtedly, the third-party doctrine was fashioned in part to permit the state to engage in certain types of investigatory activities, such as using undercover informants, that if burdened by the traditional probable cause and warrant requirements, might be foreclosed altogether.[47] But a shift from regulation of information acquisition to regulation of its use would permit a de-emphasis of the search/non-search dichotomy. In a regime focusing on regulation of use, government practices that currently receive no Fourth Amendment scrutiny as a result of the third-party doctrine, such as the deployment of electronic tracking devices to trace an individual's public movements, garbage searches, and obtaining individual internet usage data records, might be recognized as searches for Fourth Amendment purposes. In other words, the scope of the warrant requirement should expand to include far more borderline search conduct than it currently does. Such an expansion can be effectively accomplished simply by acknowledging the mundane truth that people routinely, and reasonably, make limited disclosures of private information to others who are entrusted with the information for specific purposes and expected not to use their access to the information to make inferences about the individual disclosing it.[48] People place their trash on the sidewalk expecting that the garbageman, but not newspaper reporters or police officers, will have access to it during the short interval before their trash commingles with others'. People release financial information to banks, medical information to hospitals and insurance companies, and information about personal and sexual matters to therapists, reasonably expecting that such information will not be turned over to third parties. Simple recognition of the concept of limited disclosure should make it possible to distinguish between a truly private item that has been disclosed to one or more others, and information that has been "knowingly exposed to the public"—as for example, a blog post on a popular website might be. Where government conduct intrudes upon such expectations, that conduct should be subject to judicial oversight through the traditional warrant requirement.

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[46] *See* Arizona v. Hicks, 480 U.S. 321, 326 (1987) (evidence seized during warrantless search of apartment admissible as long as it is obtained by officer during lawful intrusion and there is probable cause to seize it).

[47] *See, e.g.*, Hoffa v. United States, 385 U.S. 293, 303 (1966) (holding that government need not obtain warrant prior to using undercover informant to obtain information from suspect unaware of the informant's identity).

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[48] The District of Columbia Circuit Court of Appeals recently reached precisely this conclusion in an important case involving the warrantless use of a GPS monitoring device to surveil the movements of a suspect for a month. United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010). According to the Court: "A reasonable person does not expect anyone to monitor and retain a record of every time he drives his car, including his origin, route, destination, and each place he stops and how long he stays there; rather, he expects each of those movements to remain 'disconnected and anonymous.'" *Id.* at 563, 568 (holding that extended monitoring with GPS device requires warrant) (quoting Nader v. Gen. Motors Corp., 25 N.Y.2d 560, 572 (1970) (Breital, J., concurring)).

But whether the warrant should issue, and for what uses the information obtained thereby should be permitted, should not simply be a matter of probable cause. Indeed, individualized probable cause itself need not always be the focus of the warrant inquiry.[49] In a regime prioritizing the regulation of the use of information, the reasonableness of any search depends not only on the presence or absence of probable cause that the search will turn up evidence of a crime, but also on the degree to which the information sought by the state is of an intimate nature, as well as on the state's intended use of the information. Before issuing a warrant, magistrates might be asked to balance factors such as the degree of privacy intrusion implicated by the search, the gravity of the crime suspected, and whether the state has a justifiable basis to suspect the individual targeted by the search. Highly intrusive searches should require stronger justifications than minimally intrusive searches. At the same time, where grave crimes are suspected, a lower threshold—perhaps reasonable suspicion—should suffice to justify the search. Where less serious crimes are suspected, a correspondingly stronger showing—probable cause or in some cases, perhaps something even higher—might be demanded before a warrant should issue. Just as importantly, judicial oversight should not be restricted to the acquisition of information. As will be discussed in the next section, the government's use of information obtained in a search should be limited by the needs that justified the intrusion at the start. Such regulation of the use of private data is essential to safeguarding individual privacy.

Balancing these factors may be difficult, but the process would be smoothed once a search-specific methodology was developed, and distinctions made—and regularized—among the variety of search methods, such as garbage searches and the use of tracking devices, that currently receive no judicial oversight. The net result might be a Fourth Amendment that provides greater privacy protection to individuals against government search techniques that currently are completely unregulated, without preventing the state from investigating serious allegations of criminal activity.

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[49] *Cf.* Arizona v. Gant, 129 S. Ct. 1710, 1723 (2009) (permitting vehicular searches incident to arrest where driver is outside vehicle at time of search when it is "reasonable to believe the vehicle contains evidence of the offense of arrest").

B. Regulation of Suspicionless Searches

If an expanded warrant requirement is necessary to ensure judicial oversight over governmental use of data-gathering technologies that the state focuses upon individual suspects, the threat posed by the diffusion of technology increases the urgency of instituting new forms of anti-terrorism surveillance in the absence of particularized suspicion. Such searches might include the widespread use of scanning devices and sensors, the use of artificial intelligence technology to monitor telephonic and electronic communications, and data-mining tactics intended to identify patterns of suspicious activity that would otherwise be unobservable. At the same time that Fourth Amendment standards must be bolstered to protect targeted individuals against the misuse or abuse of intrusive search tactics, Fourth Amendment standards should be relaxed in the context of suspicionless surveillance of the general population to ensure that the government can obtain the information it needs to protect the nation against terrorism. As explained below, that relaxation must be accompanied by a narrow use requirement that bars the state from using suspicionless searches for any purpose other than that which justified the search.

Suspicionless searches are hardly a new phenomenon. As the Supreme Court held in *Camara v. Municipal Court*[50] and *See v. City of Seattle*,[51] where the government's purpose is primarily "administrative," the individualized suspicion normally demanded by the Fourth Amendment is not necessary. In a series of subsequent cases, the Court expanded the administrative search doctrine to a variety of other areas. Under a doctrine that came to be known as "special needs," the Court has permitted suspicionless searches at borders[52] and highway checkpoints,[53] drug-testing of student-athletes[54] and railroad employees,[55] and searches by government employers and school officials on less than probable cause.[56] Suspicionless searches justified by the administrative and special needs doctrines also were instituted at airports and public buildings in the late 1960s in response to a dramatic upsurge in airplane hijackings and courthouse bombings.[57] Special needs searches have been permitted so long as the government's primary purpose in conducting the searches was something other than simple law-enforcement or the "general interest in crime control," and was effectively advanced by them.

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[50] 387 U.S. 523, 538-39 (1967).

[51] 387 U.S. 541, 545-46 (1967).

Antiterrorism searches fit well within the parameters of the special needs doctrine, and the next generation of surveillance tactics, including the deployment of sophisticated scanners to detect traces of chemical, biological, and nuclear weapons, as well as a wide variety of cyber-surveillance, biometric, and data-mining projects might well qualify as special needs searches. Given the gravity of the threat posed by the unchecked proliferation of technologies that can cause immense damage to government and society, permitting such surveillance absent traditional probable cause is sensible and, in any event, probably inevitable. Not all commentators, however, agree with this analysis. In a recent article, Ric Simmons has rejected the claim that antiterrorism searches might be justified under the current special needs doctrine on grounds that "the alleged special need of 'public safety' is 'inextricably intertwined' with the goal of crime control in the antiterrorism context."[58] According to Simmons, claiming that antiterrorism searches have "a public safety purpose rather than a law-enforcement or crime-control purpose is simply disingenuous."[59] Simmons is, of course, correct that the distinction between public safety and crime control purposes is unconvincing at best. But that is an argument against the special needs doctrine in general, because many of the special needs searches permitted by the Court, including establishing checkpoints to catch drunk drivers and illegal immigrants, have aims that are inextricably intertwined with law enforcement. Antiterrorism searches are no different, and involve a public safety issue of vastly greater danger that may well require use of a variety of suspicionless search tactics to detect. If one accepts that doctrine itself as legitimate—grounded perhaps more on the general reasonableness of suspicionless searches in some contexts rather than the existence of non-crime control primary purposes—the fact that antiterrorism searches necessarily implicate crime control goals is not an effective argument against inclusion of such searches within the doctrine. Thus, unlike Simmons, I believe the special needs doctrine is well-suited to deal with a variety of high-tech surveillance tactics that might soon be, or already are being, regularly utilized.

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[52] United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) (noting that "travelers may be stopped at fixed checkpoints near the border without individualized suspicion even if the stop is based largely on ethnicity") (citing United States v. Martinez-Fuerte, 428 U.S. 543, 562-63(1976)).

[53] Mich. Dept. of State Police v. Sitz, 496 U.S. 444 (1990).

[54] Bd. of Educ. v. Earls, 536 U.S. 822 (2000).

[55] Skinner v. Ry. Executives Ass'n, 489 U.S. 602 (1989).

[56] Because the primary purpose (or, after the 2005 amendments PATRIOT Act amendment, a "substantial purpose") of Foreign Intelligence Surveillance Act ("FISA") searches is to obtain information about foreign intelligence or to prevent acts of terrorism, both legitimate and weighty governmental interests, FISA searches also can be comfortably located within the realm of the special needs doctrine.

[57] *See generally* Ric Simmons, *Searching for Terrorists: Why Public Safety Is Not a Special Need*, 59 DUKE L.J. 843 (2010) (recounting the history of suspicionless antiterrorism searches, beginning with the institution of suspicionless searches at airports and courthouses, and concluding that such searches are justified as special needs doctrine if, but only if, that doctrine were modified to prevent the state from using any evidence obtained in criminal prosecutions).

Nonetheless, the need for pervasive anti-terrorism surveillance must be reconciled with the need for privacy protection. The proper balance can be struck by modifying the special needs doctrine to enforce strict limits on the use the government may make of any non-terrorism-related information thereby obtained.[60] The real danger accompanying any expansion of suspicionless searches is that government will use them for purposes other than preventing terrorism and that anti-terrorist surveillance will become simply another tool to further the "general interest in crime control."[61] A strict ban on the use of the fruits gathered in such searches to prosecute crimes unrelated to terrorism would prevent that from happening. Here, the traditional arguments deployed on behalf of the exclusionary rule hold sway. If the state cannot use evidence of ordinary crimes obtained in the course of performing anti-terrorism searches, it will not have any incentive to use an anti-terrorism exception as a general vehicle to fight crime. In addition, it will not be able to use the anti-terrorism rationale as a pretext to search persons it suspects of criminal activity.

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[58] *Id.* at 890-91 (quoting Bourgeois v. Peters, 387 F.3d 1303, 1312-13 (11th Cir. 2004)).

[59] *Id.* at 891.

[60] *Id.* at 915.

Ric Simmons has taken this position to the extreme. In Simmons' view, if the government is authorized to perform suspicionless anti-terrorism searches, the government should not be able to use *any* evidence gathered in the course of such a search for any prosecutorial purpose whatsoever. Such a blanket rule, however, puts law enforcement to an impossible choice—either limit anti-terrorism searches to those in which the traditional Fourth Amendment prerequisites—probable cause and a warrant or exception to the warrant requirement—are present, or forego criminal punishment of the individual. The rule, even Simmons concedes, might be hard for many to swallow given that it might require the suppression of evidence necessary to convict "a criminal attempting to blow up an airplane or shoot a judge."[62] But such a Hobson's choice is not necessary to effectuate the purposes of an exclusionary rule in this context. The problem with intrusive anti-terrorism searches, and indeed all searches justified by the administrative and special needs doctrines, has less to do with the potential prosecutorial use of sought-for evidence or contraband and more to do with the potential for the pretextual use of the suspicionless search authority to conduct broad "fishing expedition" searches. The governing assumption of these doctrines, after all, is that the government's "special needs" purpose for conducting the search outweighs the intrusions it imposes on citizens. If preventing a terrorist from blowing up a plane or bombing a courthouse permits a suspicionless search of persons entering airports and courthouses, the same preventive, specific and general deterrence arguments justify prosecuting any such terrorists caught by the program.

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[61] Delaware v. Prouse, 440 U.S. 648, 659 n.18 (1979).

[62] Simmons, *supra* note 57, at 921. Simmons locates this concern among "conservatives," but I think such concerns would be readily shared by liberals, centrists, socialists, and tea partiers alike.

Although in general, special needs searches should authorize government agents to search for and seize only items related to the purpose of the search, and the exclusionary rule should bar the use of unrelated evidence uncovered by it, the doctrine of implied consent should impose reasonable limits on the use of the exclusionary rule in this context.

Recognition of an implied consent exception seems sensible. Consider an airport search in which the TSA official conducting the search discovers a kilo of cocaine in a suitcase. As a type of administrative or special needs search, the exclusionary principle advocated here, without some modification, would require the TSA agent to ignore the cocaine or perhaps more likely, simply dispose of it, but either way, the rule should bar the use of the cocaine in a criminal prosecution. Now consider a so-called "sneak and peak" search of the apartment of a person of interest in a foreign intelligence investigation. Imagine that government agents, lacking any individualized suspicion of criminal conduct, perform such a search and find a kilo of cocaine in the apartment. It seems to me quite reasonable to conclude that the cocaine should be admissible as evidence in the first case, but not the second because airplane travelers have the option of avoiding an encounter with airport security simply by choosing not to fly, whereas persons who are secretly targeted in foreign intelligence investigations have no ability to avoid the encounter. Where subjects of a search have a meaningful option of avoiding it, and can at least partially control the terms on which the search takes place, the doctrines of implied consent and assumption of the risk provide a strong justification for permitting the state to keep the fruits of any evidence obtained as a result of an administrative or special needs search.[63] Where searches are unanticipated and submission involuntary, however, search targets cannot be said to have assumed the risk or impliedly consented to the search, and the exclusionary rule should bar the state from using any evidence not related to the primary purpose of the search in a criminal prosecution.[64]

In short, well-designed anti-terrorism surveillance should be permitted under the special needs doctrine, and where evidence of terrorism activity is obtained through a special needs anti-terrorism search tactic, it should be admissible for prosecution of terrorism crimes. Any other evidence obtained as a byproduct of the search, however, unless doctrines of implied consent or assumption of risk apply, should be inadmissible. Although the authorization of even highly intrusive anti-terrorism surveillance is justifiable given the nature of the threat, any intrusive surveillance program must include narrow limits on the use of evidence or information obtained through such programs. Judicial oversight is crucial to this goal, and the administrative warrant model approved in *Camara* and *See* might provide the framework for an effective oversight model in the anti-terrorism context. Such oversight would properly shift to the judicial branch the heavy responsibility for ensuring that intrusive suspicionless surveillance is permitted only where the surveillance is reasonably calculated to safeguard important state anti-terrorism interests and less intrusive methods are unavailable or impractical.

Indeed, the doctrinal move I am advocating here for anti-terrorism surveillance should, I would argue, extend to the administrative and special needs doctrines in their entirety. When any type of state search or seizure activity that normally would be subjected to traditional Fourth Amendment standards is exempted from those standards under the administrative or special needs doctrines, the state's right to use information obtained thereby should be restricted to the purposes that justified the exemption in the first place. Roadblocks established to prevent drunk driving, or to gather evidence about hit-and-run incidents, should not be used as a pretext to search vehicles arbitrarily for weapons or contraband. School purse or locker searches that are justified by the school's administrative need to maintain order and discipline and to enforce school rules should not be used as a pretext to permit school principals to act as constitutionally-unregulated deputies in searching for and seizing evidence of crime. Housing inspections of apartment buildings intended to ensure compliance with city housing codes should not be used by the state to gather evidence of crime against the residents of public housing.

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[63] That view was at work in many of the early airport search cases. *See, e.g.*, United States v. Moreno, 475 F.2d 44 (5th Cir. 1973); United States v. Legato, 480 F.2d 408 (5th Cir. 1973).

[64] To the extent that evaluating whether implied consent was present would raise difficult questions of voluntariness and risk assumption, such questions might be settled on a case-by-case basis. In drunk driving roadblock cases, for example, the bar on admission of collateral evidence might be found to apply unless the roadblock was set up so as to give drivers a meaningful way to avoid proceeding through the roadblock.

This doctrinal solution was, in fact, pushed by some during the formative period of the administrative search and special needs doctrines, but it was ultimately rejected.[65] However, subsequent experience with the impact of technology on the government's ability to acquire information in myriad ways should lead to a reconsideration of that position. By shifting the focus of the Fourth Amendment away from regulating state acquisition of information and towards regulating the use of information in its possession, Fourth Amendment law would be poised to redress its twin failures: failing to provide any measure of real privacy protection in a technologically-advanced world, while failing to provide the state with a secure legal foundation to engage in the types of surveillance that will be necessary for national security in the twenty-first century.

C. The Contraband Exception and Smart Search Technology

As a practical matter, the tension between substantive privacy protection and the state interest in crime prevention can also be eased through expansion and development of "smart search" technology. In *United States v. Place*[66] and *Illinois v. Caballes*,[67] the Court established and reaffirmed the so-called "contraband exception," holding that exposing closed luggage or automobiles to drug-sniffing dogs does not constitute a search and therefore requires no constitutional justification. According to the Court, "governmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.'"[68] This principle seems to permit deployment of sensory technologies of various sorts directed towards constitutionally protected spaces, including homes, as long as the technologies are designed, like dog sniffs, to reveal only the presence or absence of contraband. Such smart search technologies designed to detect radioactive, biological, and chemical weapons should fall safely within the *Place-Caballes* "contraband-only" exception.

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[65] *See* United States v. Davis, 482 F.2d 893, 909 n.44 (9th Cir. 1973), *abrogated by* United States v. Aukai, 497 F.3d 955 (9th Cir. 2007); United States v. Skipwith, 482 F.2d 1272, 1278 (5th Cir. 1973) (rejecting defendant's claim that suppression of contraband discovered during suspicionless airport search was necessary to negate incentive for officers to conduct pretextual searches).

To date, however, the Supreme Court has treated dog sniffs as sui generis, underscoring its reluctance to expand the contraband exception to other types of technology.[69] This reluctance is in plain view in the *Kyllo* case. The Agema Thermovision 210 thermal imager employed by federal agents to scan Kyllo's house was designed to detect infrared radiation which, the Court observed, "virtually all objects emit."[70] Since use of the thermal imager permitted the agents to obtain information about the "interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,'"[71] it reasoned, the use of the thermal imager "is a search and is presumptively unreasonable without a warrant."[72] This holding seems to place severe limitations on the types of surveillance technologies that might fit within the *Place-Caballes* exception. After all, although scanning homes with a thermal imager provides some information of an innocent nature about the interior of the home to the person using the scanner, it is difficult to imagine many innocent homeowners caring whether the state obtains the information gleaned through use of the scanner. After all, the kind of information obtainable through use of a thermal imaging device is simply not particularly intrusive, revealing, or intimate. In revealing only information about which innocent people lack any substantial interest in preserving as private, the use of a thermal imaging device seems consistent in principle with the *Place-Caballes* exception. On its facts and given *Place*'s precedent, *Kyllo* probably should have been decided the other way.

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[66] 462 U.S. 696 (1983).

[67] 543 U.S. 405 (2005).

[68] *Id.* at 408 (emphasis in original) (quoting United States v. Jacobsen, 466 U.S. 109, 123 (1984)).

[69] *Id.* at 409.

[70] Kyllo v. United States, 533 U.S. 27, 29 (2001).

[71] *Id.* at 34 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

[72] *Id.* at 40.

As it stands, *Kyllo* places major obstacles in the path of efforts to deploy scanning and sensor technologies in residential areas. Although smart search technologies might be developed that exclusively detect criminal activity, it is also possible—indeed, quite likely—that technologies developed to detect the presence of nuclear, chemical, or biological weapons will also inevitably detect additional information about innocent activities.[73] Such scanners would apparently be unlawful to use despite their significant benefits. Indeed, a second aspect of the Court's ruling in *Kyllo*—its emphasis on the privileged Fourth Amendment status of the home—has led at least one court to conclude that even pure contraband searches conducted by drug-sniffing canines are unlawful when a private residence, rather than a suitcase or a car, is the target.[74]

In light of the continuing diffusion of potentially destructive technologies, that outcome is problematic. Moreover, it seems unlikely that use of such scanners would be perceived by most citizens as a significant invasion of privacy. After all, scanners that allow security officials to view images of "naked" travelers have already been incorporated into airport security systems, and air travelers continue to travel notwithstanding their use. Although some privacy advocates have protested the use of the scanners, most travelers appear willing to submit to such scans.[75] The public's grudging acceptance of through-the-clothing scanners in public airports suggests that a broader *Place-Caballes* doctrine might be tolerated. After all, a scanning device that renders individuals naked to the scanner obviously reveals information that most people consider to be quite private, yet scores of airport travelers already submit to such searches with little hesitation, and its routine use in the future is virtually certain. Acceptance of the technology, it seems likely, is less a result of the fact that people can opt out of such searches in favor of equally-intrusive pat-downs if they wish, than that 1) the searches occur at a remove, 2) the scans are performed by trained agents who see hundreds of such images each day and therefore are not likely to derive much personal gratification in viewing any particular image, 3) the scanners are used for the limited purpose of detecting weapons, and 4) the threat the scanners are intended to detect is significant and commonly acknowledged.

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[73] For instance, a scanning device designed to sense the presence of radioactive substances might detect possession of isotopes used for medical purposes.

[74] State v. Rabb, 920 So. 2d 1175 (Fla. App. 2006). The holding in *Raab* was anticipated by Justice Stevens in his *Kyllo* dissent. *See* 533 U.S. at 48 (Stevens, J., dissenting) (explaining that the *Kyllo* holding renders the use of dog-sniff-type devices unconstitutional when directed at homes).

These same factors might also tend to minimize the perceived intrusion from the use of surveillance technologies that permit the government to search for the presence of WMD in constitutionally-protected places using technologies that may well also uncover information that is indisputably thought private. Public opposition to the use of such technology is likely to win reluctant acceptance, as the recent experience with airport full-body scanners suggests, as long as the surveillance occurs at a remove, information produced by the surveillance is not disseminated beyond a small group of specially-trained agents, and the technology is used only for the limited purpose of detecting indications of significant terrorist activity.

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[75] One survey reported that over ninety percent of British travelers, and sixty-six percent of New Zealanders who travel by air, did not object to use of the scanners. *See Most Kiwis OK with Full-Body Scans*, TVNZ, Apr. 14, 2010, http://tvnz.co.nz/travel-news/most-kiwis-ok-full-body-scanners-3462303. Travelers in Hong Kong and Mexico, in contrast, registered greater discomfort with the full body scans. *Id.; see also People 'Happy to Use Airport Full-Body Scanners,'* BBC NEWS, Apr. 13, 2010, http://news.bbc.co.uk/2/hi/uk_news/8617144.stm. A bit more than two-thirds of U.S. passengers expressed willingness to submit to such scans. *See Brits Much Happier to Use Full-Body Scanners than US Travelers*, CHEAPOAIR TRAVEL BLOG (Apr. 13, 2010), http://blog.cheapoair.com/news/british-citizens-are-happier-to-use-full-body-scanners-than-us-citizens.aspx (reporting results from same survey).

CONCLUSION

Technology is a double-edged sword. The diffusion of destructive technology is a serious threat to national security that will require increasing vigilance to monitor and combat. Radical Islam may or may not be a passing threat, but the potential use of increasingly powerful technologies to cause major damage is a permanent feature of modern civilization that will persist as long as the technology remains available. At the same time, the government's ability to use technology to surveil its citizens poses a dramatic threat to privacy, and that threat promises only to grow with the continued development of surveillance capacity.

In this paper, I have suggested that in order to make the Fourth Amendment relevant in light of these developments, it must adapt simultaneously in two ways. First, Fourth Amendment law must acknowledge the social and technological implications of privacy. In a high-tech, electronically networked society, virtually all important information will be stored in repositories accessible by others. Current law, which fails to recognize legitimate expectations of privacy in information that has been exposed to third parties, fails to protect privacy altogether. Understandings of what constitutes a reasonable privacy expectation must be modified to recognize that limited disclosure of private information is both necessary and essential, and that such limited disclosure does not strip such information of its private nature. Courts should broaden their definition of what constitutes a "search" by abandoning the third-party doctrine and expanding constitutional protection of information that has been disclosed to limited groups of others for anticipated purposes.

At the same time, the government's pressing need to prevent major acts of terrorism from occurring will require it to take ever-more-intrusive surveillance measures. To the extent possible, anti-terrorism surveillance should rely on "smart surveillance technologies" that are triggered solely by the presence of dangerous weapons or controlled materials that can be used to commit major acts of terrorism. Because such technology only reveals the presence of contraband, like the dog sniffs considered in *Place* and *Caballes*, the use of such technologies is not a "search" and thus need not be subject to any judicial scrutiny.

However, there is no guarantee that such technologies can be developed to locate and identify all major threats. In that case, other more invasive forms of surveillance may be necessary. To be effective, surveillance probably cannot be limited solely to public areas, but in all likelihood will need to intrude upon areas that currently receive constitutional protection under the Fourth Amendment. Fourth Amendment law must adapt to these eventualities while continuing to serve its vital function as a guarantor of individual liberty, autonomy, and privacy. The way to do this, I have argued, is to shift the Fourth Amendment's focus from regulating acquisition of information to regulating its use. Such a shift can be commenced within the current doctrinal framework by recognizing that anti-terrorism surveillance constitutes a "special need" that makes application of the traditional requirements of individualized suspicion and warrants impractical and thus, in constitutional terms, unreasonable. To prevent this expansion of government search authority from undermining basic liberties, recognition of anti-terrorism searches as special needs searches must be accompanied by a restriction on the use of evidence obtained in the course of a special needs-authorized search. Any evidence of crime unrelated to terrorism should be flatly inadmissible in any criminal proceeding against the target of such a search. Evidence of terrorism crimes, however, would be admissible for purposes of criminal prosecution of such crimes, since admissibility furthers the goals for which the search was conducted. Use of the exclusionary rule here to preclude any use of non-terrorism evidence will serve its traditionally-recognized purposes of deterring improper or pretextual searches by depriving the state of the fruits of such searches.

These suggestions obviously represent only a partial solution to what is likely to become a perpetual problem—keeping the Fourth Amendment relevant in light of a rapidly changing technological environment in which both the nature and gravity of public dangers and the capacity of government to acquire and process information about its citizens increases. Additional steps will undoubtedly be necessary, but the common denominator, I would suggest, is finding ways to shift the focus of Fourth Amendment law from regulation of the acquisition of information to regulation of its use. Additional appropriate measures might include exploring new forms of judicial oversight that demand both "prior disclosure and explanation and subsequent regular reporting and minimization,"[76] perhaps along the lines already established for foreign intelligence investigations in FISA, accompanied by more carefully controlled regulation of access to and misuse of information stored in government databases, including new criminal penalties for unlawful disclosure or misuse. Not all, or perhaps not even the most important, solutions to the challenge of technology will be at the level of constitutional law. Legislative initiatives may be far more important. Nonetheless, keeping the Fourth Amendment alive and relevant in light of the coming onslaught of new technology is an essential task in the brave new world.

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[76] Balkin, *supra* note 42, at 22.

ANALOGY BREAKERS: A REALITY CHECK ON EMERGING TECHNOLOGIES

Luke M. Milligan[*]

INTRODUCTION

Like it or not, the analogy is indispensable to legal reasoning. This maxim is perhaps best exemplified by the perennial attempts of jurists to fold the particulars of cyberspace into established criminal procedure doctrine. An e-mail is just like regular mail.[1] Or isn't it? That holds for text messages![2] Or doesn't it? Laptop searches at the border: like luggage?[3] How about GPS? It's a modernized form of the "beeper" from *Knotts* and *Karo*?[4] I think.

In search of the "right" analogy to mediate new technology and old rules, courts and commentators naturally hone in on technological "functions." Cell phones, in the context of the Fourth Amendment, provide a good illustration. Government lawyers regularly claim that cell phones should be treated like "address books" because they share a functional role: aggregating contact information of friends and associates. Yet defense lawyers counter that cell phones should be treated like laptop computers because both facilitate word processing and internet access. While some courts buy the first analogy, and others the second, it is important to understand that both decisions rest on a common premise: that a functional analogy is a sufficient condition of legal reasoning.

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[*] Assistant Professor of Law, University of Louisville School of Law. The author is grateful for comments received at the 2010 Criminal Procedure Discussion Forum held at the University of Aix-Marseilles III (Provence). In addition I would like to thank Bartley Hagerman for his diligent research assistance.

[1] *See, e.g.*, Warshak v. United States, 490 F.3d 455, 474-75 (6th Cir. 2007) (analogizing screening of postal mail to screening of e-mail, and concluding that persons have a reasonable expectation of privacy in the content of e-mails), *vacated on other grounds*, 532 F.3d 521 (6th Cir. 2008) (en banc).

[2] *See, e.g.*, Quon v. Arch Wireless Operating Co., 529 F.3d 892, 905 (9th Cir. 2008) ("We see no meaningful difference between the e-mails at issue in *Forrester* and the text messages at issue here [and] we also see no meaningful distinction between text messages and letters."); *see also* United States v. Forrester, 512 F.3d 500, 510 (9th Cir. 2008) ("[E]-mail to/from addresses . . . constitute addressing information and do not necessarily reveal any more about the underlying contents of communication than do phone numbers.").

[3] *See, e.g.*, United States v. Arnold, 523 F.3d 941, 947 (9th Cir. 2008) ("Arnold has failed to distinguish how the search of his laptop and its electronic contents is logically any different from the suspicionless border searches of travelers' luggage . . . .").

[4] *See, e.g.*, United States v. Garcia, 474 F.3d 994, 996-97 (7th Cir. 2007) (discussing United States v. Knotts, 460 U.S. 276 (1983) and United States v. Karo, 468 U.S. 705 (1984)).

I will leave the ongoing debates regarding functional equivalence for others. Taking a more collateral approach, this paper critiques the "mono-analogical" framework channeling the debate. The term "mono-analogical" designates a brand of analogical reasoning where only a single dimension of a subject is mapped.[5] I argue that the prevailing mono-analogical approach to cyber-issues (which places near-exclusive emphasis on a technological instrument's functional role) is indeterminate, undisciplined, and in disregard of the subtler lessons of landmark Fourth Amendment opinions such as *United States v. Knotts* and *Kyllo v. United States*.[6]

In this article I call for a shift in constitutional criminal procedure adjudication, away from the mono-analogical and toward the poly-analogical. A poly-analogical framework invites courts to reflect on not only matters of functional equivalence, but also on the more practical implications of a new instrument's emergence. Examples of an instrument's non-functional dimensions include frequency of use, storage capacity, efficiency, and ability to facilitate information aggregation.[7] Importantly, courts can incorporate the poly-analogical framework through application of a simple doctrinal test which I term the "analogy breaker." This proposed test can be applied to most any intersection of criminal procedure and cyberspace technology.

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[5] In the cell phone decisions, one dimension (the phone's functionality) is generally mapped. So, as a practical matter, if the court believes that the *functionality* of a cell phone is like a pager or address book, the warrantless search is reasonable; if not, it is unreasonable.

[6] *Kyllo*, 533 U.S. 27 (2001); *Knotts*, 460 U.S. 276 (1983).

[7] "Prevalence" is doctrine-specific. For "search incident" issues, prevalence includes "frequency of use" within grab area and "storage capacity." For evaluating "expectations of privacy," the "prevalence" factors would be "cost of use" and "effectiveness." *See* discussion *infra* notes 55-57 and accompanying text.

I. ANALOGICAL REASONING IN CRIMINAL PROCEDURE

The intersection of criminal procedure and cyberspace is marked by a flawed method of analogical reasoning. We begin our analysis with a brief and general discussion of the role of the analogy in legal reasoning.

A. Analogy in Law

"There is no word," observed John Stuart Mill, "which is used more loosely, or in a greater variety of senses, than [a]nalogy."[8] A typical definition is "[a] form of logical inference or an instance of it, based on the assumption that if two things are known to be alike in some respects, then they must be alike in other respects."[9] Over the past decades, numerous scholars have examined the role of analogical reasoning in judicial decisionmaking.[10] The "characteristic form of analogical thought in law," wrote Professor Sunstein, "appears to work in four simple steps":

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[8] 2 JOHN STUART MILL, A SYSTEM OF LOGIC, RATIOCINATIVE AND INDUCTIVE: BEING A CONNECTED VIEW OF THE PRINCIPLES OF EVIDENCE AND THE METHODS OF SCIENTIFIC INVESTIGATION 87 (London, Longmans, Green, Reader, & Dyer 9th ed. 1875).

[9] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 64 (4th ed. 2009). "Analogy" is most often confused with "metaphor" and "inductive inference." *See id.* at 1104 (defining "metaphor" as "[a] figure of speech in which a word or phrase that ordinarily designates one thing is used to designate another, thus making an implicit comparison."); *see also* Dan Hunter, *Reason is Too Large: Analogy and Precedent in Law*, 50 EMORY L.J. 1197, 1206-11 (2001) (emphasizing the differences between analogy and inductive reasoning). *But see* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 89 (Harvard Univ. Press 1993) (claiming that analogy and induction are one in the same).

[10] For recent discussions of analogical reasoning in law, see generally Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57 (1996); Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996); Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353 (1997); Hunter, *supra* note 9; Frederick Schauer, *Why Precedent in Law (and Elsewhere) is Not Totally (or Even Substantially) about Analogy*, 3 PERSP. ON PSYCHOL. SCI. 454 (2008); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987); Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179 (1999); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993). For earlier treatments, see generally EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 9-

> (1) Some fact pattern A has a certain characteristic X, or characteristics X, Y, and Z; (2) Fact pattern B differs from A in some respects but shares characteristics X, or characteristics X, Y, and Z; (3) The law treats A in a certain way; (4) Because B shares certain characteristics with A, the law should treat B the same way.[11]

While analogical reasoning is particularly attractive to judges confronting technologies that were not likely foreseen at the time of the drafting of relevant legislation or precedent,[12] the use of analogical reasoning to mediate old rules and emerging technologies has led to mixed results.[13] As Professor Cohen has observed, whenever "new technologies have entered the market, courts have similarly struggled in analogizing them to older technologies . . . ."[14] Gaffes include the "legal confusion surrounding the analogizing . . . of the telephone to the telegraph" and the failure of courts to initially recognize radio and film as protected forms of speech.[15] Perhaps no analogical mis-

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27 (Univ. of Chi. Press 1949); RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 25-30 (Stanford Univ. Press 1961).

[11] *See* Sunstein, *supra* note 10, at 745.

[12] *See* Jonathan H. Blavin & I. Glenn Cohen, *Gore, Gibson, and Goldsmith: The Evolution of Internet Metaphors in Law and Commentary*, 16 HARV. J.L. & TECH. 265, 267 (2002); Susan Freiwald, *First Principles of Communications Privacy*, 2007 STAN. TECH. L. REV. 3, ¶8 (stating that courts generally avoid or cut short "reasonable expectation of privacy analysis for modern electronic communications because the analysis pushes [judges] beyond their [judicial] competence"); Stephanie A. Gore, *"A Rose by Any Other Name": Judicial Use of Metaphors for New Technologies*, 2003 J.L. TECH. & POL'Y 403, 408 (noting that a significant number of Americans are "technophobic" and reasoning that if judges are similar to the vast number of Americans, they may be more willing to accept metaphors and analogies for new technologies rather than undertaking the task of understanding whether the metaphors and analogies fit the particular legal question before them).

[13] *See* City of Ontario v. Quon, 130 S. Ct. 2619, 2629 (2010) ("The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.") (citing Olmstead v. United States, 277 U.S. 438 (1928)).

[14] *See* Blavin & Cohen, *supra* note 12, at 268.

[15] *Id.* (citing ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 100 (1983)); *see* Mut. Film Corp. v. Indus. Comm'n, 236 U.S. 230, 243-44 (1915) (stating that films were

step was greater than that of *Olmstead v. United States.*[16] The Federal Bureau of Investigation had used wiretaps to obtain evidence of a conspiracy to transport and sell liquors.[17] Finding that the wiretaps were installed without a physical trespass, Chief Justice Taft, writing for the majority, concluded that no Fourth Amendment "search" had occurred.[18] The Court analogized as follows: numerous Fourth Amendment cases of the Court had involved facts without a physical trespass; in none of the cases without a physical trespass had there been a Fourth Amendment "search"; the mere use of a wiretap causes no physical trespass; thus the mere use of a wiretap does not constitute a Fourth Amendment "search."[19]

Looking to improve on this "bad track record,"[20] lower courts in the United States are searching, as I write, for the right analogies to mediate old doctrine and new cyber-technologies. Just a brief survey of current criminal procedure litigation reveals a host of prevailing analogies. These include (but are certainly not limited to) analogies between the content of letters and e-mail; letters and texts; envelopes and e-mail addresses; envelopes and e-mail subject lines; shopping and web-browsing; "beepers" and GPS tracking; and border searches of luggage and laptops.[21]

In their attempts to "cyberize" criminal procedure doctrine, courts regularly utilize a form of legal reasoning that I term "mono-analogical."[22] By "mono-analogical" I mean that

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"moving pictures" rather than a traditional method of expression, and thus not subject to First Amendment protection), *overruled by* United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948); City of Richmond v. S. Bell, Tel. & Tel. Co., 174 U.S. 761, 773-78 (1899); *see also* United States v. Lee, 274 U.S. 559, 563 (1927) ("[U]se of a searchlight is comparable to the use of a marine glass or a field glass.").

[16] 277 U.S. 438 (1928).

[17] *Id.* at 455.

[18] *Id.* at 466.

[19] *Id.* Of course the Court reversed itself nearly forty years later in *Katz v. United States*, 389 U.S. 347 (1967).

[20] *See* Blavin & Cohen, *supra* note 12, at 267.

[21] *See supra* notes 1-4 and accompanying text. *See generally* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801 (2004).

[22] *See* discussion *infra* Part II.A.

only one dimension of a subject is mapped during the adjudication. To illustrate "mono-analogical" reasoning, the following paragraphs profile a particular point of intersection between criminal procedure and cyber-technologies: the incorporation of cell phones into the "search incident to arrest" doctrine.

B. Illustrating Mono-Analogical Reasoning

One of the oldest exceptions to the warrant requirement concerns searches incident to lawful arrests. The exception, at its core, encompasses searches of an arrestee's person and those items found within the arrestee's "grab area."[23] Over the past decades warrantless searches of wallets, purses, tablets, pagers, and address books have been held to be "reasonable" under the "search incident" doctrine.[24]

In recent years, lower courts have been tasked with mediating the "search incident" rules and cell phone technologies.[25] The courts are routinely asked by government lawyers to treat cell phones like pagers, address books, or general containers. Their claim is that the "Contact List" on such phones serves a particular functional role—that of organizing contact information—and that items that serve such a role, when found within an arrestee's grab area, can be searched without a warrant following a lawful arrest. The government's argument can be framed as follows:

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[23] *See* United States v. Robinson, 414 U.S. 218, 226 (1973); Chimel v. California, 395 U.S. 752, 762-63 (1969). The scope of such a search varies depending on whether the arrestee was a recent occupant of a vehicle. *See* New York v. Belton, 453 U.S. 454, 460-61 (1981), *holding limited by* Arizona v. Gant, 129 S. Ct. 1710 (2009).

[24] *See, e.g.*, United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996) (pager); United States v. Rodriguez, 995 F.2d 776, 778 (7th Cir. 1993) (wallet and address book); United States v. McFarland, 633 F.2d 427, 429 (5th Cir. 1980) (notebook paper); United States v. Garcia, 605 F.2d 349, 355 (7th Cir. 1979) (purse); United States v. Gonzalez-Perez, 426 F.2d 1283, 1287 (5th Cir. 1970) (purse); United States v. Frankenberry, 387 F.2d 337, 339 (2d Cir. 1967) (diary); Grillo v. United States, 336 F.2d 211, 212 (1st Cir. 1964) (wallet); United States v. Vaneenwyk, 206 F. Supp. 2d 423, 425 (W.D.N.Y. 2002) (day planner); United States v. Chan, 830 F. Supp. 531, 535-36 (N.D. Cal. 1993) (pager). The concept of "grab area" is curtailed, at certain points, by due process considerations. Schmerber v. California, 384 U.S. 757, 769-70 (1966) (holding that absent "clear indication" evidence will be found, warrantless searches incident to arrest are unreasonable if they "involv[e] intrusions beyond the body's surface").

[25] While the analogical reasoning in "search incident" cases might be ultimately irrelevant if *Gant*, 129 S. Ct. 1710, is extended to non-vehicle cases, the flaws of mono-analogical reasoning, as illustrated here in particular, would still be generally true and therefore hold in other doctrinal corners of constitutional criminal procedure. *See infra* note 66.

> (1) Address books and pagers have certain functions X and Y; (2) Cell phones differ functionally from address books and pagers in some respects (they also offer Z), but share functions X and Y; (3) The law permits warrantless searches of address books and pagers found within an arrestee's grab area; (4) Because cell phones share functions X and Y with address books and pagers, the law should permit warrantless searches of cell phones found within an arrestee's grab area.

Perhaps not surprisingly, those judges holding cell phone searches to be "reasonable" have routinely drawn analogies to address books,[26] pagers,[27] or general containers.[28] As a recent district court observed: "Decisions of district courts and Courts of Appeals (often analogizing cell phones to the earlier pager technology) trend heavily in favor of finding that the search incident to arrest or exigent circumstances exceptions apply to searches of the contents of cell phones."[29]

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[26] United States v. Valdez, No. 06-CR-336, 2008 WL 360548, at *2-*4 (E.D. Wis. Feb. 8, 2008) (analogizing cell phones to, *inter alia*, address books); United States v. Urbina, No. 06-CR-336, 2007 WL 4895782, at *13-*14 (E.D. Wis. Nov. 6, 2007) (analogizing cell phones to, *inter alia*, address books); United States v. Cote, No. 03-CR-271, 2005 WL 1323343, at *6 (N.D. Ill. May 26, 2005) ("Searches of items such as wallets and address books, which I consider analogous to Cote's cellular phone since they would contain similar information, have long been held valid when made incident to an arrest.") (citing *Rodriguez*, 995 F.2d 776).

[27] United States v. Finley, 477 F.3d 250, 260 n.6 (5th Cir. 2007) (analogizing cell phones to pagers); United States v. McCray, No. CR408-231, 2009 WL 29607, at *4 (S.D. Ga. Jan. 5, 2009) ("A cell phone, like a beeper, is an electronic 'container,' in that it stores information that may have great evidentiary value (and that might easily be destroyed or corrupted)."); *Valdez*, 2008 WL 360548, at *2-*4 (analogizing cell phones to, *inter alia*, pagers).

[28] *Finley*, 477 F.3d at 259-60 (finding that the "search incident" doctrine "extends to containers found on the arrestee's person" and concluding that search of a cell phone's stored text messages was reasonable); United States v. Wurie, 612 F. Supp. 2d 104, 110 (D. Mass. 2009) ("I see no principled basis for distinguishing a warrantless search of a cell phone from the search of other types of personal containers . . . ."); *see also* People v. Diaz, 244 P.3d 501 (Cal. 2011) (finding that warrantless cell phone searches incident to arrest are reasonable because cell phones are "property").

While the government claims a functional analogy between cell phones and address books, defendants not only contest such an analogy, but counter with a preferred analogy of their own: one between cell phones and laptop computers.[30] Cell phones, they explain, organize large amounts of information, and in more recent models, facilitate word processing and internet access. Their argument, in its essence, can be framed as follows:

> (1) Laptop computers have certain functions A and B; (2) Cell phones differ functionally from laptops in some respects (they do not offer functions C and D), but share functions A and B; (3) The law does not permit warrantless searches of laptops found within an arrestee's grab area; (4) Because cell phones share functions A and B with laptops, the law should not permit warrantless searches of cell phones found within an arrestee's grab area.[31]

Courts finding warrantless searches of cell phones incident to arrest to be "unreasonable" have uniformly rejected the proposed analogy to address books, pagers, or containers, and they have regularly (though not always) adopted the defense's counter-analogy to the laptop.[32]

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[29] *Wurie*, 612 F. Supp. 2d at 109. Not surprisingly some lower courts have left the underlying analogies unstated, disposing of the legal claims by resort to citations to authority. *See* United States v. Deans, 549 F. Supp. 2d 1085, 1094 (D. Minn. 2008) (citing *Finley*, 477 F.3d at 258-60); United States v. Santillan, 571 F. Supp. 2d 1093, 1101-04 (D. Ariz. 2008)).

[30] While it seems to be generally understood that warrantless searches of laptop computers incident to arrest are not "reasonable" under the Fourth Amendment, there are surprisingly few cases on point. For one example, see State v. Washington, No. 47773-1-I, 2002 WL 104492, at *3 (Wash. Ct. App. Jan. 28, 2002).

[31] *Cf.* Sunstein, *supra* note 10, at 745.

[32] United States v. Park, No. CR 05-375 SI, 2007 WL 1521573, at *8 (N.D. Cal. May 23, 2007) (analogizing cell phones to laptops); *see also* United States v. Zavala, 541 F.3d 562, 577 (5th Cir. 2008) (stating, in the context of *Terry* stops, that "[a] cell phone is similar to a personal computer that is carried on one's person"); United States v. Urbina, No. 06-CR-336, 2007 WL 4895782, at *13-*14 (E.D. Wis. Nov. 6, 2007) ("If the evidence in a future case were to show that the warrantless search conducted by law enforcement was essentially equivalent to a search of a personal computer, without

With that said, one state high court has recently rejected proposed analogies to both the address book and the laptop.[33] The Ohio Supreme Court, in *State v. Smith*, held that cell phone searches incident to arrest were unreasonable.[34] While three justices bought the government's analogy to pagers (and therefore claimed the underlying search to be "reasonable"), the majority disagreed, observing that:

> [C]ell phones defy easy categorization. On one hand, they contain digital address books very much akin to traditional address books carried on the person . . . . On the other hand, they have the ability to transmit large amounts of data in various forms, likening them to laptop computers . . . . But cell phones are neither address books nor laptop computers.[35]

Although the majority adopted neither of the proposed analogies, it should be emphasized that it did not take issue with the concept of mono-analogical reasoning. To the contrary it seems to have embraced such reasoning. Finding no suitable analogs in place, the Court simply identified a new functional category which would be expected to serve as the touchstone for mono-analogical reasoning in future cases.[36]

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sufficient exigencies to justify such a search, the court's reaction may be different, because of the substantial invasion of privacy."). For commentary on the analogy between cell phones and laptops, see Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 SANTA CLARA L. REV. 183, 221 (2010) ("Whatever rule applies to computers should certainly apply to new generation cellular devices . . . ."); Bryan Andrew Stillwagon, *Bringing an End to Warrantless Cell Phone Searches*, 42 GA. L. REV. 1165, 1201 (2008) (urging "the judiciary to recognize that cell phones are . . . much more analogous to modern computers than to wallets, briefcases, or even pagers").

[33] State v. Smith, 920 N.E.2d 949, 955 (Ohio 2009).

[34] *Id.*

[35] *Id.*

[36] *Id.* The Court did not reject "mono-analogical" reasoning, but simply held that they could not find a "right" analog for cell phones within the existing state of precedent. *Id.* at 952 (noting that "whether the warrantless search of a cell phone passes constitutional muster depends upon how a cell phone is characterized"); *id.* at 954 (stating that "the question becomes how [the cell phone] should be classified").

II. THE POLY-ANALOGICAL FRAMEWORK

A. The Problem: "Mono-Analogical" Reasoning

The previous section identified how U.S. courts, in the face of emerging cell phone technologies, have gravitated toward a mode of reasoning marked by excessive reliance on functional analogies. The following paragraphs discuss the dangers of mono-analogical reasoning, emphasizing how it is indeterminate, undisciplined, and (when utilized in the context of criminal procedure litigation) in disregard of some of the subtler lessons of *Knotts* and *Kyllo*.[37]

(1) Indeterminate

Mono-analogical reasoning is oftentimes indeterminate. After all, it casts judges in the roles of etymologist, linguist, and philosopher. Off they go: to discern and compare the Ideal of Cell Phoneness, of Address Bookness, and of Laptopness. This might remind one of H.L.A. Hart and "the most famous hypothetical in the common law world": whether a statue of a truck violates the "no vehicles in the park" ordinance.[38] Or of Professor Hunter's query whether a ferry is a "floating hotel" or merely a "seagoing train."[39] With each, there is (in some real sense) no "wrong" answer, let alone any readily identifiable way to evaluate the merits of a judicial decision. Such indeterminacy offers jurists wide discretion to reach conclusions post hoc.[40]

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[37] Kyllo v. United States, 533 U.S. 27 (2001); United States v. Knotts, 460 U.S. 276 (1983).

[38] Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1109 (2008) (referring to Hart's example as "the most famous hypothetical in the common law world"); *see* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

[39] Hunter, *supra* note 9, at 1207. In the cell phone context, one might imagine the bench memo that reads: "Address book or laptop? Your call, Judge."

[40] One sees that, as a practical matter, mono-analogical reasoning has led to pro-defendant decisions based on forced (and probably disingenuous) analogies. Too many of the pro-defendant decisions rest on awkward claims that traditional cell phones are like laptop computers, or, alternatively, that cell phones are not "immediately associated with the person" pursuant to *United States v. Chadwick*, 433 U.S. 1, 15 (1977).

(2) Undisciplined

A second flaw with mono-analogical reasoning is that it leads courts to deviate over time (and often subconsciously) from the intended arc of precedent. Assume a court in 1982 holds that it is permissible to conduct a warrantless search of a litigation bag found within the arrestee's grab area. And further assume that thirty years later the same court is faced with the question of whether it is permissible to search word processing files saved on an iPhone found within the arrestee's grab area. Applying a mono-analogical method, a judge might very well find the search of the iPhone "reasonable":

> (1) Litigation bags have certain functions X, Y, and Z; (2) iPhones differ functionally from litigation bags (for instance, they offer functions A and B) but share functions X, Y, and Z; (3) The law permits warrantless searches of litigation bags found within an arrestee's grab area; (4) Because iPhones share functions X, Y, and Z with litigation bags, the law should permit warrantless searches of iPhones found within an arrestee's grab area.

So, what's the problem here? How might such a holding deviate from precedent? While the iPhone is (arguably) functionally analogous to the litigation bag (both are mobile containers which store documents), the doctrine's application to iPhones exponentially increases the amount of private information obtainable by the government without cause or a warrant.[41] In 1982 perhaps only a few thousand people within the United States at a given point in time had litigation bags within their grab area. (And, of this subset, perhaps only a few hundred people maintained large catalogs of privileged or personal documents in such bags). In 2012, perhaps fifty million people within the United States at any given moment will—due to developing technologies and shifting norms—maintain privileged or personal documents within their grab area. And of these fifty million a significant percentage are bound to be maintaining a large catalog of documents. So while the litigation bag is in many ways functionally analogous to the iPhone, it is possible (and perhaps likely) that the 1982 court, had it been able to foresee the future, would have incorporated limiting principles into its decision to prevent this sort of mono-analogical "slide."[42] Is it unreasonable for courts to transpose limiting principles onto decisions handed down in different times or places? Of course not. Any durable common law system demands such inferences. Yet unfortunately, such inferences are systematically foreclosed by mono-analogical reasoning. And so the use of mono-analogical reasoning creates, over time, a sort of "operator" effect: where the essence of past decisions is but faintly recognizable in any of its alleged progeny.

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[41] *See* Sunstein, *supra* note 10, at 746 ("[A]nalogical reasoning goes wrong when there is an inadequate inquiry into the matter of relevant differences and governing principles."); Blavin & Cohen, *supra* note 12, at 267 (stating that in the related concept of metaphors, "[c]ommentators have warned that the unreflective use of metaphors can lead lawyers to take for granted the 'realities' that metaphors enable").

(3) Disregards Lessons of *Knotts* and *Kyllo*

Third, mono-analogical reasoning disregards the subtle lessons of landmark criminal procedure decisions involving emerging technologies.[43] In *United States v. Knotts*[44] and *United States v. Karo*,[45] the Supreme Court held that the use of a beeping tracking device does not violate expectations of privacy so long as it does not provide the government with information that would otherwise be unobtainable through lawful visual surveillance.[46] The *Knotts* and *Karo* holdings stemmed, more or less, from a simple functional analogy: visual surveillance from public spaces is not a "search"; the use of a beeper to track persons in public is functionally analogous to visual surveillance;

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[42] *See generally* City of Ontario v. Quon, 130 S. Ct. 2619, 2630 (2010) ("A broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted. It is preferable to dispose of this case on narrower grounds.").

[43] Kyllo v. United States, 533 U.S. 27 (2001); United States v. Knotts, 460 U.S. 276 (1983).

[44] 460 U.S. 276.

[45] 468 U.S. 705 (1984).

[46] *Knotts*, 460 U.S. at 282 ("Visual surveillance from public places along Petschen's route or adjoining Knotts' premises would have sufficed to reveal all of these facts to the police.").

thus, the use of a beeper to track persons in public does not constitute a "search." Yet in important dictum Justice Rehnquist, writing for the *Knotts* majority, suggested that a valid functional analogy could only carry the government so far: "If such [24-hour surveillance and] dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable."[47] Such was a tacit admission that functional analogies, while certainly of value, will not always be a sufficient condition of legal reasoning at the intersections of criminal procedure and emerging technologies.

A second case disregarded by mono-analogical reasoning is *Kyllo v. United States*.[48] The Court in *Kyllo* held that use of thermal-imaging technology on a home violated reasonable expectations of privacy.[49] The government in that case proposed a functional analogy between thermal-imaging technology and ordinary visual surveillance. Justice Stevens, writing for the dissent, relied on such an analogy to conclude that Kyllo's house was not searched.[50]

> [T]he ordinary use of the senses might enable a neighbor or passerby to notice the heat emanating from a building, particularly if it is vented, as was the case here. Additionally, any member of the public might notice that one part of a house is warmer than another part or a nearby building if, for example, rainwater evaporates or snow melts at different rates across its surfaces. Such use of the senses would not convert into an unreasonable search if, instead, an adjoining neighbor allowed an officer onto her property to verify her perceptions with a sensitive thermometer. Nor, in my view, does such observation become an unreasonable search if made from a distance with the aid of a device that merely discloses that the exterior of one house,

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[47] *Id.* at 283-84 (Knotts had expressed "the generalized view that the result of the holding sought by the Government would be that 'twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision.'").

[48] 533 U.S. 27 (2001).

[49] *Id.* at 34.

[50] *Id.* at 43 (Stevens, J., dissenting).

> or one area of the house, is much warmer than another. Nothing more occurred in this case.[51]

The majority opinion, while critical of the dissent on multiple fronts, let alone the analogy between visual surveillance and thermal-imaging technology. The merits of the analogy aside, Justice Scalia rejected the dissent's claim that such analogy was dispositive: "[w]e rejected such a mechanical interpretation of the Fourth Amendment in *Katz*, where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth."[52] *Kyllo* exemplifies how the efficiencies of a new technology can disrupt the citizen-state relationship to the point where functional analogies, even while technically valid, are deemed an inadequate mode of legal reasoning.[53]

B. The Solution: "Poly-Analogical" Reasoning

The lower courts' mediation of cyber-technologies and criminal procedure by resort to mono-analogical reasoning is flawed. And so two questions arise: First, what is missing? Second, what can be done? The missing component, as it turns out, is what I term "prevalence." And the solution is to employ what I term an "analogy breaker." Both concepts are discussed in the following paragraphs.

When courts are tasked with applying precedent to emerging technologies, it is imperative that they contemplate (if only generally) any *implied* limitations in past decisions.[54] The excavation of implied limitations gives courts the foundation to draw analogies regarding multiple dimensions of a new technological instrument. For lack of a better word, these other, non-functional dimensions might be referred to as "prevalence" dimensions.

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[51] *Id.*

[52] *Id.* at 35 (majority opinion). In effect, the *Kyllo* Court read *Katz* as holding that the analogy between wiretaps and eavesdropping was non-dispositive. *See* Katz v. United States, 389 U.S. 347, 364 (1967) (Black, J., dissenting).

[53] Admittedly the Court has been explicit that the increase in government efficiency is not grounds, by itself, to find a reasonable expectation of privacy. *See* United States v. Knotts, 460 U.S. 276, 284 (1983).

[54] For example, when a court holds that a warrantless search of an address book incident to arrest is "reasonable," it is making a finding that it is permissible in our society to give police discretion to read such address books without a warrant. And it is hard to deny that implicit in such a finding is the understanding that a certain percentage of persons will at any given time be carrying an address book, and that those who do will tend to have only a limited amount of information in such books.

The term "prevalence" bundles at least three dimensions of any new technological instrument. First, "prevalence" relates to how an instrument, taken in conjunction with norms, alters the *amount* of data available (looking at searches in the aggregate) within a traditional search domain.[55] Second, "prevalence" relates to how an instrument, although functionally equivalent to traditional means of surveillance, affects the *efficiency* of government surveillance.[56] Third, "prevalence" relates to how an instrument, although functionally equivalent to traditional means of surveillance, affects the government's ability to *aggregate* information over time and across the population.[57] In each of these situations, "prevalence" reveals a practical implication of an instrument that is hidden when only functions are considered.

But even if this is right—that common sense, the internal structure of common law adjudication, and Fourth Amendment case law suggest that poly-analogous reasoning is theoretically superior to mono-analogous reasoning—how can these "prevalence" dimensions be incorporated, as a practical matter, into the numerous criminal procedure doctrines?

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[55] Examples include the *Katz* Court's recognition that norms of increased public phone usage altered the amount of data available through warrantless public phone wiretaps. *Katz*, 389 U.S. at 352 ("To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."). Beyond the technology realm, a good example is Justice Brennan's view that local ordinances prohibiting burning trash added value to traditional trash searches. *See* California v. Greenwood, 486 U.S. 35, 55 (1988) (Brennan, J., dissenting).

[56] Examples include the *Kyllo* Court's emphasis on the costs and unreliability of watching snow melt off roofs, the *Dow* Court's admission that a "search" might have occurred had the government photographs not been grainy, and the *Katz* Court's mention of the infeasibility of officers eavesdropping on phone booths. *See Kyllo*, 533 U.S. at 35 n.2; Dow Chem. Co. v. United States, 476 U.S. 227, 238 (1986); *Katz*, 389 U.S. at 352. While the Court has of course stated that surveillance "efficiency" is not a ground to recognize a new expectation of privacy, *see Knotts*, 460 U.S. at 284, the Court's actions should speak at least as loudly as its words. *Kyllo*, 533 U.S. 27.

[57] The best example here is the Court's statement in *Knotts* that it would be willing to revisit its ruling, that the use of beepers to track public movements are not "searches," should dragnet surveillance became commonplace. 460 U.S. at 284.

Incorporation, as it turns out, is easy. The "analogy breaker" is a straightforward, supplemental analysis to be applied before courts adjust doctrine based on a functional analogy. To illustrate the "analogy breaker," we return to the "search incident" doctrine.

In the context of the "search incident" rules, the "analogy breaker" would provide:

> Do not rely on a functional analogy to allow warrantless searches of a new technological instrument if either:
>
> > (1) the use of that instrument within the grab area (across the population); or
> >
> > (2) the information generally extractable from that item (across the population)
>
> is significantly greater than that associated with its functional analog at the time the search of the analog was first allowed.[58]
>
> And, conversely, do not rely on a functional analogy to disallow warrantless searches of a new technological instrument if either:
>
> > (1) the use of that instrument within the grab area (across the population); or
> >
> > (2) the information generally extractable from that item (across the population)
>
> is significantly less than that associated with its functional analog at the time the search of the analog was first disallowed.[59]

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[58] While admittedly vague, the term "significantly" cannot be quantified. It seems permissible to leave this to judicial discretion. I would say, however, that the usage of cell phones is without a doubt "significantly" greater than that of address books. Moreover, the information generally extractable from a cell phone is "significantly" greater than that from an address book.

Note that if the functional analogy fails, or, alternatively, the functional analogy is "broken," the reviewing court should undertake a fresh "default" analysis of the new technological instrument.[60] (For instance, in the "search incident to arrest" context, the default analysis would ask: "Do officers need to search cell phones in order to preserve their safety or to prevent the destruction of evidence?"[61]) The "analogy breaker" does not despise functional analogies. It simply offers the courts a tool to identify misleading functional analogies and direct their analyses back to first principles.

C. Application of Poly-Analogical Reasoning

When we apply the "analogy breaker" to mediate the "search incident" rules and cell phone technology, we find three possible scenarios:

> A court could reject the functional analogy to address books and laptops. It would then resort to the default query.[62]

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[59] One should note that only a single strain of "prevalence," relating to the *amount* of information affected, is relevant to the analogy breaker for the "search incident" doctrine. This is because the analyzed instrument is the target of the government action rather than the instrument of government action. Conversely, the analogy breaker to consider the use of an instrument of government action (e.g., the scope of a "search") turns on a consideration of alternative strains of "prevalence" (efficiency and aggregation). *See infra* Part II.D.

[60] This would also have the effect of allowing courts to revisit precedent regarding a specific instrument if use within the grab area, or information generally extractable, decreases significantly with time.

[61] *See* Chimel v. California, 395 U.S. 752 (1969) (explaining that the search incident doctrine is motivated by the need to protect officers and prevent the destruction of evidence). Courts at this level would also consider "intrusiveness." *See, e.g.*, Florida v. Riley, 488 U.S. 445 (1989); United States v. Place, 462 U.S. 696, 706-07 (1983). Intrusiveness differs from prevalence as it focuses not on the windfall of information, but on the interruption of quality of experience.

[62] The default query is: "Do officers need to search cell phones to preserve their safety or to prevent the destruction of evidence?" If the answer is yes, then the search is reasonable. If no, the search is unreasonable. For an example of similar legal reasoning in the "search incident" context, see Judge Werdegar's dissenting opinion in *People v. Diaz*, 244 P.3d 501, 513 (Cal. 2011) (Werdegar, J., dissenting) ("A particular context-dependent balancing of constitutionally protected privacy interests against the police interests in safety and preservation of evidence led the United States Supreme Court,

> A court could adopt the functional analogy to address books. It would then apply the "analogy breaker," asking whether the (1) the use of cell phones within the grab area (across the population); or (2) the information generally extractable from cell phones (across the population) are significantly greater than that of the address book at the time the search of the address book was first allowed. If the answer to both is no, then the functional analogy holds, and the cell phone will be treated in law like the address book. If the answer to one or both is yes, then the analogy is broken and the court should resort to the default query.[63]
>
> A court could adopt the functional analogy to laptops. It would then apply the "analogy breaker," asking whether the (1) the use of cell phones within the grab area (across the population); or (2) the information generally extractable from cell phones (across the population) are significantly less than that of the laptop at the time the search of the laptop was first disallowed. If the answer to both is no, then the analogy holds, and the cell phone is treated in law like the laptop. If the answer to one or both is yes, then the analogy is broken and the court should resort to the default query.[64]

One immediate concern might be that judges lack the expertise to determine the applicable "usage" or "extract" rates. Such a concern, however, is unreasonable. At least in the context of criminal procedure, nearly all of the vanguard cyberspace issues are litigated with assistance from public interest groups. These groups have the resources to commission studies and retain the experts required to estimate the various "prevalence" dimensions of all new and relevant technological instruments.[65] Litigants are therefore quite capable of educating

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over 30 years ago, to hold searches of the arrestee's person reasonable despite the lack of probable cause or a warrant and despite substantial delay between the arrest and the search. Today, in a very different context of mobile phones and related devices, that balance must be newly evaluated." (citation omitted)).

[63] *See supra* note 62.

[64] *See supra* note 62.

[65] Examples include the Electronic Frontier Foundation and the ACLU's Technology and Liberty Program.

courts to render competent and informed judgments in their applications of "analogy breakers."

D. Extrapolating the Analogy Breaker

The "analogy breaker" is not confined to "search incident" doctrine, but can be applied across the spectrum of criminal procedure issues.[66] Take the perennial question of whether the government's use of a new surveillance instrument constitutes a Fourth Amendment "search." The "analogy breaker" in this context would preclude a court from holding "no search" through a mere functional analogy if either (1) the efficiencies of collection gained by the new surveillance instrument, or (2) the ability to aggregate information through the new surveillance instrument, is significantly greater than its functional analog at the time the court first held that its use did not constitute a "search."[67] Of course the breaking of the analogy would not mean that the use of the challenged surveillance instrument constitutes a "search"—it would simply mean that the court must engage in a fresh analysis of whether the instrument's use violates a "reasonable expectation of privacy."[68]

For instance, consider GPS tracking devices. *Knotts* and *Karo* held, as a general matter, that no expectations of privacy are violated when one is tracked by a beeper in public. Beeper surveillance is functionally analogous to GPS surveillance (both are used to locate a moving entity). A court might be prone to extend this ruling, through mono-analogical reasoning, to GPS surveillance. Yet such an analysis would ignore the "prevalence" dimensions of GPS technology. Through application of the "analogy breaker," a court should ask, before altering the "search" doctrine, whether (1) the efficiencies of collection gained by GPS, or (2) the ability to aggregate information through GPS, is significantly greater than that which was associated with beeping devices at the time the Court ruled on beepers. If the answer to both is no, then the reviewing court should hold that there is no expectation of privacy to be free of GPS surveillance while in public. If the answer to one or both is yes, then the court should undertake a fresh analysis (denuded of the functional analogy between GPS and beepers) whether persons have a reasonable expectation of privacy to be free from GPS surveillance while in public.

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[66] So even if the cell phone cases are resolved in a different manner (e.g., extending *Arizona v. Gant* to non-vehicle arrests), the lessons from the lower court's treatment of cell phone searches can be extrapolated to other areas of criminal procedure.

[67] Note that the relevance of "reliability" and "aggregating power" can be inferred from *Kyllo* and *Knotts*. *See supra* notes 56 & 57.

[68] *See generally* Freiwald, *supra* note 12, at ¶8 ("It requires them first to analyze society's views about the intricacies of new technologies that most users, including judges, do not understand. Properly done, the reasonable expectation of privacy analysis also requires that courts supplement that positive finding with a normative inquiry into the role of new communications technologies and whether users should be entitled to believe such communications are private. Courts have either avoided the reasonable expectation of privacy analysis, or have cut short the analysis, because they lack adequate empirical data for the positive inquiry and adequate guidance for the normative one." (footnote omitted)).

CONCLUSION

Courts naturally and necessarily turn to analogical reasoning to incorporate cyber-technologies into existing doctrinal rules. And when it comes to criminal procedure, the preferred form of legal reasoning has been mono-analogous. Such reasoning, however, is indeterminate, undisciplined, and in disregard of the subtleties of landmark cases like *Knotts* and *Kyllo*. This article suggests, as an alternative, a poly-analogous approach: one that respects the necessity for functional comparisons but at the same time gives due credit to the practical dimensions of emerging technologies. Such practical dimensions can be incorporated into prevailing doctrine with little difficulty. The "analogy breaker," applicable across the spectrum of criminal procedure doctrine, will help courts identify the essence of precedent and, as a result, effectively mediate old criminal procedure rules and new technologies.

POST-*MIRANDA* SILENCE IN THE WIRED ERA: RECONSTRUCTING REAL TIME SILENCE IN THE FACE OF POLICE QUESTIONING

Steven I. Friedland[*]

> "And the vision that was planted in my brain, Still remains, within the sound of silence . . . ."[1]

> "Can you hear me now?"[2]

INTRODUCTION

"Silence is golden" is a centuries-old adage passed down from generation to generation.[3] Such an adage, however, recently became a significant issue in determining the meaning of the right to remain silent under the Fifth Amendment,[4] particularly with respect to the requirements for invoking and waiving that right.

While *Miranda v. Arizona*[5] famously declared that the Fifth Amendment privilege against compelled incrimination protects a suspect's right to remain silent,[6] *Miranda* did not consider the constitutional significance of silence—especially protracted silence—in the face of post-*Miranda* police questioning.[7] Several issues remained open. Could an individual's knowing silence constitute an invocation of the right to silence? Could a person who answers a question after a period of sustained silence[8] be considered to have waived his or her rights? If so, what is the burden that must be met to show waiver?

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[*] Professor of Law and Senior Scholar, Elon University School of Law.

[1] SIMON AND GARFUNKEL, THE SOUNDS OF SILENCE (Columbia Records 1965).

[2] This question has been asked in many situations over the years, but was most recently made famous as the tag-line in a Verizon Wireless cellular telephone commercial in 2004.

[3] As one commentator noted, "It is said of Cicero, the Roman statesman and rhetorician, that he felt there was an art as well as an eloquence of silence." Thomas J. Bruneau, *How Americans Use Silence and Silences to Communicate*, 4(2) CHINA MEDIA RES. 77, 77 (2008).

[4] U.S. CONST. amend. V.

[5] 384 U.S. 436 (1966).

[6] The Supreme Court has not confronted all of the permutations involving the use of an accused's silence. Pre-*Miranda* silence is still not constitutionally settled, prompting much discussion and debate. *See, e.g.*, Jan Martin Rybnicek, *Damned if You Do, Damned if You Don't?: The Absence of a Constitutional Protection Prohibiting the Admission of Post-Arrest, Pre-*Miranda *Silence*, 19 GEO. MASON U. CIV. RTS. L.J. 405 (2009); Marc Scott Hennes, *Manipulating* Miranda*:* United States v. Frazier *and the*

Miranda offers some bright lines for determining whether an accused's statements are eligible for admissibility in a subsequent trial. *Miranda* dictates that statements will be presumptively inadmissible if there are no prefatory warnings and a showing that the warnings are understood. Yet, *Miranda* offers no parallel structured process for the waiver of those rights, other than to say the burden "rests on the government," which must show that the rights have been "knowingly and intelligently waived."[9] The Court stated: "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[10]

The Supreme Court in *Miranda* admonished that a waiver must meet a high standard:

> This Court has always set high standards of proof for the waiver of constitutional rights, *Johnson v. Zerbst*,[11] and we

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*Case-in-Chief Use of Post-Arrest, Pre-*Miranda *Silence*, 92 CORNELL L. REV. 1013 (2007); Marty Skrapka, *Silence Should Be Golden: A Case Against the Use of a Defendant's Post-Arrest, Pre-*Miranda *Silence as Evidence of Guilt*, 59 OKLA. L. REV. 357 (2006).

[7] It is now well-established that post-*Miranda* silence cannot be used by a prosecutor against a suspect in a later criminal trial. In *Doyle v. Ohio*, 426 U.S. 610, 619 (1976), the Supreme Court held that such silence by an accused cannot be used by the prosecution to impeach the accused if he should testify. In addition, the Court held in *Wainright v. Greenfield*, 474 U.S. 284, 295 (1986), that the prosecution also cannot use the equivalent silence by an accused as evidence in the prosecution's case-in-chief.

[8] Or mostly sustained silence constitutes an invocation, which was apparently the situation in *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010).

[9] *Id.* at 2261 (quoting *Miranda*, 384 U.S. at 475).

[10] *Miranda,* 384 U.S. at 473-74. Thus, a more narrowly framed question arises—does "in any manner" include silence?

[11] 304 U.S. 458 (1938).

> re-assert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.[12]

The Court added: "But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."[13]

By setting clear, predictive guidelines for lawyers and those working in the stationhouses around the country, *Miranda* addressed issues of formalism and functionalism.[14] Further, both the formal and functional attributes of the warnings mattered in weathering a rocky and turbulent response. Despite, or perhaps because of, the *Miranda* framework, the area of police interrogation still presents a fertile and unsettled legal area, with persistent issues such as subtle coercion[15] remaining.

Because of the continuing debate, *Miranda* spawned a generous progeny. In *Michigan v. Mosley*,[16] the Supreme Court discussed the effect of invoking the right to remain silent, characterizing it as a "right to cut off questioning" that must be scrupulously honored by the police.[17] In *North Carolina v. Butler*,[18] the Court permitted an implied waiver of the right to remain silent based on "a course of conduct."[19] Recently, in *Berghuis v. Thompkins*,[20] the Supreme Court confronted the constitutional significance of post-*Miranda* silence, answering questions about the impact of silence on the invocation and waiver of the Fifth Amendment rights, and the respective burdens attached to each. In a 5-4 decision, with Justice Anthony Kennedy writing the majority opinion, the Court first concluded that the police need not obtain a waiver of the right to remain silent prior to commencing interrogation.[21] Justice Kennedy then fleshed out *Butler's* "course of conduct" protocol by stating, "an accused's uncoerced statement establishes an implied waiver of the right to remain silent."[22]

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[12] *Miranda*, 384 U.S. at 475 (citation omitted).

[13] *Id.*

[14] This duality was recognized in *Berghuis v. Thompkins*, citing *Moran v. Burbine*, 475 U.S. 412, 427 (1986), which called *Miranda* "both formalistic and practical when it prevents [the police] from interrogating suspects without first providing them with a *Miranda* warning." *Berghuis*, 130 S. Ct. at 2262.

[15] *See, e.g.*, Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their* Miranda *Rights: The Power of Innocence*, 28 LAW & HUM. BEHAV. 211 (2004); Richard Rogers, Kimberly S. Harrison, Jill E. Rogstad, Kathryn A. LaFortune & Lisa L. Hazelwood, *The Role of Suggestibility in Determinations of* Miranda *Abilities: A Study of the Gudjonsson Suggestibility Scales*, 34 LAW & HUM. BEHAV. 66 (2010).

[16] 423 U.S. 96 (1975).

[17] *Id.* at 100-01 (quoting *Miranda*, 384 U.S. at 474).

[18] 441 U.S. 369 (1979).

What led to this apparent shift in the burdens and epistemology of implied waiver from *Miranda* to *Thompkins*? To begin with, the Court characterized the intermediary case, *Butler*,[23] as sounding a retreat from *Miranda* when it allowed an implied waiver as a result of a course of conduct indicating as such.[24] But the retreat into a valley from the *Miranda* mountaintop appears to be much more than just a slide down the slippery slope started by *Butler*, at least in part when understood by the Court's construction of the meaning of silence.

The nature of communication has changed dramatically in American society in the past few decades, particularly with the advent of cellular technology and other technologies promoting the immediacy of communication, from the mobile phone, to text messaging, to Facebook and Twitter.[25] While the norm in prior decades had been to speak with others directly in real time, the shift toward indirect, remote, unfiltered and even asynchronous conversations has exploded in the twenty-first century. Young people "born digital"[26] have experienced life in no other way. Although dialogue remains as a basic form of relationship, it has been transformed by the peripatetic evolution of Web-era media. Silence[27] is in danger of becoming outdated.

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[19] *Id.* at 373.

[20] *Thompkins*, 130 S. Ct. 2250 (2010).

[21] *Id.* at 2262.

[22] *Id.*

[23] *Butler*, 441 U.S. 369 (1979)

[24] *Thompkins*, 130 S. Ct. at 2261. Justice Sotomayor, in a strongly worded dissent in *Thompkins*, stated that the opinion "turns *Miranda* upside down" and categorized the case as a "substantial retreat from the protection against compelled self-incrimination." *Id.* at 2266, 2278 (Sotomayor, J., dissenting).

[25] *See, e.g.*, TWITTER, http://www.twitter.com (last visited Feb. 25, 2011); *see also* FACEBOOK, http://www.facebook.com (last visited Feb. 25, 2011).

Facebook alone has 500 million active users,[28] more than most countries have in population. Twitter has brought a whole new meaning to the question, "What are you doing now?", and instant messaging is common, if not epidemic. "Wired" is part of a new vocabulary describing the developing media and the transnational culture arising around it.

The counterpart of speech, silence, is likewise affected by this communication revolution. The concept of silence is metamorphasizing with every new technological advance, and those persons who are completely unconnected electronically to others are becoming anachronistic.[29] A closer examination of "silence" shows that it can be parsed and differentiated, from a void of conversation, to communicative silences constituting active listening, to a deeper withdrawal.[30]

Based on traditional analysis, the Fifth Amendment right to remain silent and its waiver have been measured in reference to historical interrogation techniques of intimidation and coercion. In more modern times, with the ever-present electronic stimuli of cell phones, the Internet and other technological devices, the yardstick for the meaning of silence and unconnected non-participation has changed. A new conventionality about silence—and response time in particular—have arisen in the digital age, where responses tend to be instantaneous and unfiltered. The "strong silent types" of the 1950s westerns and film *noir* now pack an empty cell phone clip on their belts instead of a gun.

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[26] "Born digital" is a common reference for members of the young generation who have grown up solely in the digital age, where dial-up land-line telephones, typewriters, black and white televisions with only 12 channels, and telephone booths are mere anachronisms.

[27] Especially for a younger generation weaned on a steady diet of highly stimulating electronic games and gadgets, boredom also might be in danger of destruction, or at least diminishment, as well.

[28] Facebook Statistics, http://www.facebook.com/press/info.php?statistics (noting that "50% of our active users log on to Facebook in any given day").

[29] Newspaper headlines have become commonplace. *See, e.g.*, *High-Tech Toys Depriving Children of Much-Needed Sleep*, GREENSBORO-HIGHPOINT NEWS & REC., Aug. 23, 2010, at B9.

[30] *See, e.g.*, Thomas J. Bruneau, *How Americans Use Silence and Silences to Communicate*, 4(2) CHINA MEDIA RES. 77 (2008).

Consequently, if individualized, directed questions go unanswered, an intentionality of non-participation generally can be inferred. While this intentionality is certainly rebuttable—creating an inference and not a presumption—the Court in *Thompkins* missed an important inflection point when it essentially ignored the suspect's prolonged post-*Miranda* silence in finding an implied waiver, leading to the conclusion that silence is not golden, and that a "course of conduct" in implying a waiver can be compressed into the incriminating statement itself. The similar compression of the prosecution's "heavy burden" as described in *Miranda* also misses the mark; in an age of constant chatter, prolonged silence is not a nullity by any means, and the prosecution should be tasked with making some showing that prolonged silence by a suspect in the face of questioning was not a knowing[31] rejection of dialogue altogether.[32]

In this article I contend that the definitions of invocation and implied waiver of the Fifth Amendment right to silence advanced in *Thompkins* reconfigure the intent of *Miranda* in two ways. The Court improperly omits a closer contextual analysis of a person's silence in general, especially regarding its duration, and further ignores the transformative Web-era construction of silence as non-participation, particularly as it relates to isolation[33] and the new framework of dialogue.

The article first describes some differing perspectives of rights and examines several of the major Supreme Court cases on the road from *Miranda* to *Berghuis*. The piece then explores the dialogical features of Web-era conventionality, particularly its constant connectivity, stimuli, immediacy and micro-duration. The article then discusses whether layering in this new conventionality to the invocation and waiver analysis suggests that an interrogation of a suspect for minutes without a response—and not hours—infers that the suspect likely has invoked the right to remain silent, unless the state can meet a heavy burden to the contrary.

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[31] The idea of "knowingly" waiving rights can be seen in the Fourth Amendment analysis of searches, where a person who knowingly exposes something to the public has no subjective expectation of privacy. Katz v. United States, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

[32] Note that given Van Thompkins "mostly silent" behavior and his occasional responses, a prosecutor could have met a burden of showing that Thompkins was indeed a voluntary participant in the interrogation, especially as compared to someone who was entirely quiet and noncommunicative for more than two hours. Berghuis v. Thompkins, 130 S. Ct. 2250, 2259 (2010).

[33] Isolation is referring to a form of lack of connectedness as well as physical isolation.

BACKGROUND

Rights, Burdens and the Waiver of Rights

There are differing conceptualizations of rights that affect their application, including cross-cultural,[34] relational,[35] economic and historical perspectives.[36] Rights can be viewed as protecting both collective and individual interests. The Fifth Amendment right to silence, for example, not only describes a relationship between the state and individual, but also a protective shield rooted in self-preservation.[37] Rights also can be perceived less as a reflection of society and more as a set of sustaining policies, serving as a regulatory deterrence to government. [38] The Fifth Amendment, for example, can be seen as setting uniform boundaries on police practices as much as protecting the individual.

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[34] *See, e.g.*, South Africa and human dignity, particularly with respect to the Truth and Reconciliation Commission, where confessions are a part of restorative justice.

[35] *See, e.g.*, Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUD. 1 (1993); Hamdi v. Rumsfeld, 542 U.S. 507, 532 (2004) (constitutional case involving the rights of enemy combatants) (O'Connor, J., for the majority) ("[In] striking the proper constitutional balance . . . . it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship.").

[36] A society based on positivist laws places rights squarely within judicial interpretation and not a higher order of natural law.

[37] Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CAL. L. REV. 601, 627-30 (2009); *see also* Judith Resnik, *Detention, The War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579 (2010). Cross-cultural understandings can impact the applications and understandings of rights. For example, within the concept of Ubuntu, each individual's humanity is ideally expressed through his or her relationship with others and theirs in turn through recognition of the individual's humanity. Ubuntu means that people are human through other people. It also acknowledges both the rights and responsibilities of every citizen on promoting individual and societal well-being.

Rights also reflect a basic underlying tension between the government and individual, described as the right to security versus the right to freedom of action.[39] This tension is especially prevalent in the context of interrogation, where there is great pressure on the police to solve criminal cases,[40] while at the same time upholding a duty to protect the rights of the innocent. Deceptive practices often have been warranted by the belief that the ends justify the means. Suspects are probably guilty of some offense, the thinking goes, if not the one being investigated.[41]

The existence of a constitutional right is important, but so are the allocation of burdens of proof and the setting of a default position—determining which party wins if no additional evidence is adduced. The burdens of proof set and reflect societal expectations and can be seen as either dictating or echoing the prevailing conventionality, those reasonable expectations of experience. In a criminal case, for example, it makes sense that the requirements of due process of law mandate that the prosecution has the burden of proof to a very high standard, beyond a reasonable doubt, especially given what is at stake.

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[38] *See, e.g.*, Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 362-72 (1974) (discussing atomistic versus regulatory perspective of the Fourth Amendment and standing issues).

[39] This basic tension frames a wide variety of relationships between government power and individual protections.

[40] There is considerable literature documenting police interrogation techniques. *See, e.g.*, FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (Jones & Bartlett 4th ed. 2004) (1962). Improper pressures have come to bear not only on the accused, but also on witnesses as well. Peter Neufeld, the co-founder of the Innocence Project, notes:

> The primary cause [of wrongful convictions] is mistaken identification. Actually, I wouldn't call it mistaken identification; I'd call it misidentification, because you often find that there was some sort of misconduct by the police. In a lot of cases, the victim initially wasn't so sure. And then the police say, "Oh, no, you got the right guy. In fact, we think he's done two others that we just couldn't get him for." Or: "Yup, that's who we thought it was all along, great call."

Kathryn Schulz, *Reasonable Doubt: Innocence Project Co-Founder Peter Neufeld on Being Wrong*, SLATE MAGAZINE, Aug. 17, 2010, *available at:* http://www.slate.com/blogs/blogs/thewrongstuff/archive/2010/08/17/reasonable-doubt-innocence-project-co-founder-peter-neufeld-on-being-wrong.aspx (last visited Feb. 23, 2011).

[41] This is a common view of interrogators. *See generally* INBAU ET AL., *supra* note 40, at 239.

The waiver of rights is often a highly illuminated and dissected mechanism. When a criminal defendant waives various rights expressly by pleading guilty, for example, a plea colloquy on the record generally takes place between the accused and the judge.[42] When such rights can be waived impliedly, context becomes more important—and less clarity often results. In *Miranda*, for example, several key features of coercive interrogations were discussed by the Court—intimidation, isolation and duration. This piece advocates paying closer attention to these factors in an interrogation highlighted by a suspect's silence.

While constitutional rights can be waived, the burden of showing an implied waiver is placed squarely on the government and is a high one as well. The leading case describing the standard for waiver is *Johnson v. Zerbst*.[43] In *Zerbst*, the Supreme Court mandated that the waiver of constitutional rights must occur with intentionality.[44] *Zerbst* reflected the expectation that constitutional rights were valued highly and consequently could be waived only if the subject did so knowingly, intelligently and voluntarily—an intentionality that greatly exceeds inadvertence or the like.

INTERROGATION, RIGHTS AND WAIVER

> Confess, and all will be forgiven . . . . Not in so many words, but the message is there—in the tone of [the officer's] voice, in the proffered kindness of a cigarette or cup of coffee—and in truth the suspect will be forgiven by the cop, whose only real requirement for achieving [Sartre's] harmony [of minds] is the confession. For the higher authority, however, ... retribution must be served.[45]

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[42] *See, e.g.*, United States v. Gonzalez, 120 F.3d 269 (9th Cir. 1997).

[43] 304 U.S. 458 (1938).

[44] *Id.* at 464

[45] GARY L. STUART, MIRANDA: THE STORY OF AMERICA'S RIGHT TO REMAIN SILENT xv (2004).

1. Interrogation

Incriminating statements of a person accused of a crime have been permitted as evidence against them for centuries.[46] The import of interrogation is observed with this bedrock principle: "Many criminal cases, even when investigated by the best qualified police departments, are capable of solution only by means of an admission or confession from the guilty individual or upon the basis of information obtained from the questioning of other criminal suspects."[47]

Investigative methods for extracting incriminating statements have been just as old and widespread. Methods have ranged from physical coercion and torture to more subtle forms of persuasion.[48] Why should the police departments interrogate with a variety of methods that are constantly being refined and improved, but often feature isolation, duration and subtle influencing? The premise for such methods is that: "Criminal offenders, except those caught in the commission of their crimes, ordinarily will not admit their guilt unless questioned under conditions of privacy and for a period of perhaps several hours."[49]

Such methods were articulated and discussed in police training manuals and refined by experience. Methods included the Reid Technique,[50] for example, which alone has been used to solve thousands of crimes. That technique included three stages: (1) gathering and analysis of existing facts; (2) a structured "Behavior Analysis" interview with possible suspects; and, depending on the perceived truthfulness of responses in part 2, (3) an accusatory interrogation.[51]

Many interrogation methods escaped legal scrutiny for years. Only in the past century or so have extreme and offensive methods received judicial disapproval. In *Bram v.*

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[46] This idea goes back to the Bible and beyond.

[47] FRED E. INBAU ET AL., *supra* note 40, at xii.

[48] *See, e.g.*, *id.* at 1.

[49] *Id.* at xiv.

[50] The method was developed by John T. Reid in 1947 in Chicago, Illinois. Brian C. Jayne & Joseph P. Buckley, *The Reid Technique of Interrogation*, *available at* www.reid.com/educational_info/canada.html (last visited Feb. 23, 2011).

[51] *Id.*

United States,[52] for example, decided in 1897, the defendant was in the process of having his clothing stripped when he was interrogated. During the interrogation, Bram was informed that another suspect had fingered Bram as the culprit, and "the result . . . produce[d] upon his mind the fear that, if he remained silent, it would be . . . an admission of guilt . . . and . . . by denying, there was a hope of removing the suspicion from himself."[53] The Court ruled that placing a suspect in such circumstances "yields a confession that cannot truly be considered free of coercion."[54] The Court, deriving its principles from a lineage of English common law, required confessions to be voluntary under the Fifth Amendment.[55] The Court described the allocation of burdens, saying, "[a]ny doubt as to whether the confession was voluntary must be determined in favor of the accused . . . ."[56] Based on the facts of the case, the Court in *Bram* found that the confession was involuntary and held that its admission in evidence by the trial court was in error.[57]

2. Miranda v. Arizona[58]

Miranda was the culmination of decades[59] of physically and mentally coercive police interrogations producing incriminating statements by suspects and led to the firm establishment of the Fifth Amendment rights of interrogated suspects outside the courtroom.[60] The rights included the right to remain silent. It represented a seismic shift in the underlying assumptions about how police ought to interact with suspects, and changed the accepted standards of such interactions outside of the courtroom.[61] The case gave rise to a formalistic requirement that suspects subject to custodial interrogation must first be given a set of warnings and shown to understand those warnings.[62] In addition to dictating what evidence would no longer be competently received in criminal trials, *Miranda* recreated the relationship between police and suspects, as well as between the government and individuals.

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[52] 168 U.S. 532, 538 (1897).

[53] *Id.* at 562.

[54] M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319, 326 (2003).

[55] *Bram*, 168 U.S. at 548.

[56] *Id.* at 565.

[57] *Id.* at 565.

[58] 384 U.S. 436 (1966).

[59] There were many cases that preceded *Miranda* in confronting interrogation practices and the admissibility of coerced confessions. A major case, for example, was Bram v. United States, 168 U.S. 532 (1897). After Bram had been isolated and while in the process of being stripped of his clothes, he was interrogated. *Id.* at 538.

[60] A different and very topical issue is the impact of 9/11 and terrorism on the Fifth Amendment protections afforded by *Miranda*. *See, e.g.*, Darmer, *supra* note 54.

The initial prosecution of Ernesto Miranda stemmed from a series of events occurring in the winter of 1962 in the Phoenix, Arizona area. On the night of November 27, 1962, a young female bank teller was getting into her car in a parking lot at the branch of the bank where she had worked when she was kidnapped at knife point, driven away and robbed of $8 in her purse. [63] A similar attack occurred several months later and a third attack occurred soon thereafter.[64] In this last attack, the victim was forced into the perpetrator's car.[65] The assailant drove off and parked in an isolated place, where he raped the victim and let her go.[66] The physical descriptions matched in all three of the crimes.[67] The investigation turned toward Ernesto Arthur Miranda, although it was initially tied to him only by the similarity of the car used in the last assault—an old Packard sedan.[68] After Miranda voluntarily appeared in a line-up and was identified only as a person who looked like the assailant,[69] the investigating officer, Detective Carroll Cooley, was asked by Miranda whether they had identified him and the officer deceptively replied that the victims did.[70] Miranda then replied, "I guess I'd better tell you about it then."[71]

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[61] *Miranda* does not cover or protect from admissibility all statements by suspects. For example, the "physical fruits of the suspect's unwarned but voluntary statements" are admissible. United States v. Patane, 542 U.S. 630, 634 (2004). In *Patane,* Justice Thomas stated that "a mere failure to give *Miranda* warnings does not, by itself, violate . . . constitutional rights"—it was the use at trial that constituted the violation. *Id.* at 641. Because of this analysis, Justice Thomas concluded "police do not violate a suspect's constitutional rights . . . by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda.*" *Id.*

[62] The warnings given to Van Thompkins, the respondent in *Berghuis v. Thompkins*, are representative:

> "NOTIFICATION OF CONSTITUTIONAL RIGHTS AND STATEMENT
>
> "1. You have the right to remain silent.
>
> "2. Anything you say can and will be used against you in a court of law.
>
> "3. You have a right to talk to a lawyer before answering any questions and you have the right to have a lawyer present with you while you are answering any questions.
>
> "4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.
>
> "5. You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned."

130 S. Ct. 2250, 2256 (2010) (quoting Brief for Petitioner at 60, No. 08-1470) (some capitalization omitted in original).

[63] STUART, *supra* note 45, at 7.

[64] *Id.*

[65] State v. Miranda, 401 P.2d 721, 722-23 (Ariz. 1965).

Miranda, twenty-three years old and with an eighth grade education, wrote out a confession on a police form.[72] The confession included the following:

> Seen a girl walking up street stopped . . . walked towards her grabbed her by the arm and asked to get in car . . . . Drove away for a few mile. Stopped asked to take clothes off. Did not, asked me to take her back home. I started to take clothes off her without any force and with cooperation . . . . Could not get penis into vagina got about ½ (half) inch in. Told her to get clothes back on. Drove her home. I couldn't say I was sorry for what I had done but asked her to pray for me.[73]

Miranda signed his statement underneath the pre-printed language on the form, which stated, "I have read and understand the foregoing statement and hereby swear to its truthfulness."[74]

The United States Supreme Court took the *Miranda* case to clarify and elaborate on a prior case, *Escobedo v. Illinois*,[75] which discussed a suspect's rights within the domain of the

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[66] *Id.* at 723.

[67] STUART, *supra* note 45, at 4.

[68] *Id.* at 4-5.

[69] *Id.* at 6.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 7.

[73] *Id.* (quoting State v. Miranda, 401 P.2d 721, 727 (Ariz. 1965)).

[74] *Id.* The two investigating police officers signed the form as well. *Id.*

[75] 378 U.S. 478 (1964).

Sixth Amendment.[76] The *Miranda* decision dealt with coercive police techniques leading to involuntary statements.[77] The long history of abusive interrogation techniques was documented in the case:

> The maxim '*Nemo tenetur seipsum accusare,'* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which [have] long obtained in the continental system, and . . . [were] not uncommon even in England. . . . The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.[78]

The Court noted that police officers are told by a variety of manuals that the "principal psychological factor contributing to a successful interrogation is privacy—being alone with the person under interrogation."[79] The Court thus was breaking down distinctions between physical coercion and more subtle kinds of influence. Added the Court:

> From these representative samples of interrogation techniques, the setting prescribed by the manuals and

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[76] *Id.* The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The Court in *Escobedo* used the Sixth Amendment to overturn an issue that arose during a suspect's interrogation prior to the suspect being formally charged with a crime. *Escobedo*, 378 U.S. at 496 (White, J, dissenting). The suspect had requested counsel and the police denied that request. *Id.* at 479 (majority opinion). The dissent strongly objected to the use of the Sixth Amendment in the pre-indictment context. *Id.* at 496 (White, J., dissenting).

[77] Miranda v. Arizona, 384 U.S. 436, 439 (1966).

[78] *Id.* at 442 (citing Brown v. Walker, 161 U.S. 591, 596-97 (1896)).

[79] *Id.* at 449.

> observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support.
>
> . . . .
>
> It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity."[80]

The Court further observed the following:

> [A] defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.[81]

While this pronouncement was firm, it left many questions,[82] such as what happens if a suspect chooses to speak selectively? On this question, at least, later federal circuit court cases suggested that the right can still attach.[83]

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[80] *Id.* at 455-57. *Miranda* was considered a boon to criminal defendants, but there also was a downside. If it was a bane at all, it sowed the seeds for the implied waiver of Fifth Amendment rights. Yet, of course, it created a formalism much greater than in some other rights contexts, such as the Fourth Amendment arena, where the right to refuse requests to search need not be accompanied by any warnings at all. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 221 (1973) (stating that an informal, voluntary search of a vehicle with no warning of the party's rights was constitutional). The consequences are likely large and practical — many more people undoubtedly consent to such requests without a reading and understanding of one's right to refuse such a search. *See, e.g.*, JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: INVESTIGATING CRIME 314-15 n.1 (1st ed. 2003) (indicating that at least one study reported that two of the most common warrant "exceptions" are consent and searches incident to a lawful arrest (citing RICHARD VAN DUIZEND ET AL., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES 21 (1984)).

[81] *Miranda*, 384 U.S. at 444-45.

[82] One question was whether the police must supply a suspect with sufficient information for the suspect to decide whether to speak. *See, e.g.*, Moran v. Burbine, 475 U.S. 412, 422 (1986) (answering this question in the negative by stating that "we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights").

3. North Carolina v. Butler[84]

The case of *North Carolina v. Butler* presented the Supreme Court with the opportunity to explore what was required for the waiver of the Fifth Amendment right to counsel and whether that waiver needed to be express.[85] In *Butler*, the North Carolina Supreme Court held that an explicit statement of waiver was required for it to be recognized.[86] The Supreme Court, in an opinion written by Justice Stewart, declared that no such explicit waiver was necessary.[87]

Justice Stewart recognized that an explicit oral or written statement indicating waiver was "strong proof" that a valid waiver had occurred, but was not in itself always "necessary or sufficient" for the waiver analysis.[88]

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[83] The Ninth Circuit has decided that established law allows a suspect to refuse to be interviewed in a particular manner even if he has already waived that right with respect to the subject matter of the interrogation. *See* Arnold v. Runnels, 421 F.3d 859, 866 (9th Cir. 2005) (holding that a suspect may refuse to be interviewed on tape when he had already waived his right to silence). Other circuits agree. *See, e.g.*, United States v. Johnson, 816 F.2d 918, 921-22 n.4 (3d Cir. 1987) (discussing a suspect's right to remain silent after submitting to a polygraph); United States v. Amaro, 816 F.2d 284, 286 (7th Cir. 1987) (discussing a suspect's right to refuse to speak to FBI agents while waiving his right and speaking to prison officials). Other circuits also agree that the Constitution allows a suspect to remain silent selectively. *See* United States v. May, 52 F.3d 885, 890 (10th Cir. 1995) (holding that clearly established law allows a defendant to remain "'partially silent' by answering some questions and refusing to answer others" (quoting United States v. Canterbury, 985 F.2d 483, 486 (10th Cir. 1993)); United States v. Scott, 47 F.3d 904, 907 (7th Cir. 1995) (holding that "a suspect may . . . refuse to answer certain questions, and still be confident that *Doyle* will prevent the prosecution from using his silence against him") (citing *Canterbury*, 985 F.2d at 486); Hurd v. Terhune, 619 F.3d. 1080 (9th Cir. 2010).

[84] 441 U.S. 369 (1979).

[85] *Id.* at 372.

[86] State v. Butler, 244 S.E.2d 410 (N.C. 1978).

[87] *Butler*, 441 U.S. at 375-76. Justice Stewart also pointed out that North Carolina was not the trend-setter in interpreting the waiver requirement:

> In evident conflict with the present view of every other court that has considered the issue, the North Carolina Supreme Court has held that *Miranda v. Arizona* requires that no statement of a person under custodial interrogation may be admitted in evidence against him unless, at the time the statement was made, he explicitly waived the right to the presence of a lawyer.

Id. at 370 (citation omitted).

Justice Stewart then carved out the test for an area where waiver could be implied: "As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a *course of conduct indicating waiver*, may never support a conclusion that a defendant has waived his rights."[89]

Thus, Justice Stewart seemed to distinguish between a course of conduct and the inculpatory statements themselves. This approach appears similar to the use of statements to establish a conspiracy under the Federal Rules of Evidence—the statements can be considered, but independent evidence is required as well.[90]

Of equal significance is how the Court characterized the burdens associated with the waiver analysis. Justice Stewart stated, "The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated."[91] The Court here affirmed the idea of implied waiver, but noted that such a waiver must have clarity; equivocal or ambiguous actions will not suffice.[92]

4. Berghuis v. Thompkins[93]

In *Berghuis v. Thompkins*, Van Thompkins was interrogated as a suspect in a shooting that killed a person.[94] As the Court described it, "The interrogation was conducted in a room that was 8 by 10 feet, and Thompkins sat in a chair that resembled a school desk (it had an arm on it that swings around to provide a surface to write on)."[95]

After a detective read Thompkins his rights pursuant to *Miranda*, and Thompkins stated he understood those rights, the detective proceeded to ask him questions for two hours and forty-five minutes.[96] Stated the Court:

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[88] *Id.* at 373.

[89] *Id.* (emphasis added).

[90] *See* FED. R. EVID. 801(d)(2)(e).

[91] *Butler*, 441 U.S. at 373.

[92] *Id.* at 375-76.

[93] 130 S. Ct. 2250 (2010).

[94] *Id.* at 2256.

[95] *Id.*

> About 2 hours and 45 minutes into the interrogation, Helgert asked Thompkins, "Do you believe in God?" Thompkins made eye contact with Helgert and said "Yes," as his eyes "well[ed] up with tears." Helgert asked, "Do you pray to God?" Thompkins said "Yes." Helgert asked, "Do you pray to God to forgive you for shooting that boy down?" Thompkins answered "Yes" and looked away. Thompkins refused to make a written confession, and the interrogation ended about 15 minutes later.[97]

Thompkins was for the most part—but not entirely—silent during that entire three-hour interrogation.[98] The Court described the following situation:

> Thompkins was "[l]argely" silent during the interrogation, which lasted about three hours. He did give a few limited verbal responses, however, such as "yeah," "no," or "I don't know." And on occasion he communicated by nodding his head. Thompkins also said that he "didn't want a peppermint" that was offered to him by the police and that the chair he was "sitting in was hard."[99]

In a 5-4 decision with Justice Kennedy writing the opinion for the Court, the Court stated that "[t]he main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel."[100] Thus, the focus of the inquiry is whether there is evidence that the formal warnings are given to the suspect and that he understood them.[101] Here, the Court found that this prosecutorial burden was met when the warnings were given to the suspect Thompkins in writing and the police had him read out loud in English to ensure that he understood his Miranda rights—and could knowingly waive them.[102]

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[96] *Id.* at 2256-57.

[97] *Id.* at 2257 (citations omitted).

[98] *Id.* at 2256-57.

[99] *Id.*

[100] *Id.* at 2261.

[101] *Id.*

The Court further fleshed out the framework of analysis for the right to remain silent in a crisp statement: "[A] suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police."[103]

This framework thus shows that unless the suspect actively invokes the right to remain silent—which does not include remaining silent—interrogation can continue.[104] There is no time limit to the interrogation, since the right to remain silent could be interposed "at any time."[105]

Finally, even without a suspect's invocation of the right to remain silent by equivocal conduct or simply silence, a waiver analysis still occurs to ensure that the waiver is valid and uncoerced. That analysis still is derived from *Butler's* "course of conduct" analysis, but "the course of conduct" can be shown by a single uncoerced word or statement.[106] Here, the statement, despite occurring after two hours and forty-five minutes of silence in the face of police interrogation, constituted both the course of conduct supporting waiver of the Fifth Amendment right to remain silent and the suspect's confession.[107] Justice Kennedy stated:

> Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his "'right to cut off questioning.'" Here he did neither, so he did not invoke his right to remain silent.[108]

The court stated, "As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford."[109] The burden for waiver still remains on the prosecution. It can be met, however, if the prosecution can prove that the waiver was "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation . . . ."[110]

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[102] *Id.* at 2256

[103] *Id.* at 2264.

[104] *Id.*

[105] *Id.*

[106] North Carolina v. Butler, 441 U.S. 369, 373 (1979).

[107] *Thompkins*, 130 S. Ct. at 2263.

[108] *Id.* at 2260 (quoting Michigan v. Mosely, 423 U.S. 96, 103 (1975) (quoting Miranda v. Arizona, 384 U.S. 436, 474 (1966))) (citations omitted).

As a corollary, the Court in *Thompkins* stated that "an accused who wants to invoke his or her right to remain silent . . . [needs to do so] unambiguously."[111] Thus, *Thompkins* clearly carved out some ground where a suspect has neither invoked nor waived his rights, essentially by remaining silent or acting ambiguously. This ground is significant, because it effectively notes that without the invocation of rights, the default position is interrogation. "After giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived *Miranda* rights."[112]

Thus, after *Thompkins*, it appears that there still is a right to remain silent, but suspects must affirmatively say or act like they want to invoke it. Acting silent is insufficient.[113]

THE NEW SILENCE—THE WEB-ERA CONVENTIONALITY

The digital era has transformed the way we relate, particularly the centuries-old conceptualization of the conversation or dialogue. While real-time conversation remains a basic form of relationship, it has been transformed by the peripatetic evolution of Web-era media and the advancement of electronic communications. As one commentator has noted, "[I]ncreasing speeds in human behavior and communication seem to parallel more contacts, more talk, more movement, more noisy conditions, and less and less silence."[114] Further, a dialogue in the digital era can be asynchronous, pseudo ominous, in short-hand or digital code, and reach thousands, if not millions of people, in seconds. Several new features dominate the post-digital evolution of dialogue and especially one of its corollaries, silence.

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[109] *Id.* at 2262.

[110] *Id.* at 2260 (quoting Moran v. Burbine, 475 U.S. 412, 421 (1987)).

[111] *Id.*

[112] *Id.* at 2254.

[113] In a decision decided after *Thompkins*, the Ninth Circuit emphasized that even after a person has spoken with interrogators, subsequent chosen silence remains protected by the Fifth Amendment. Hurd v. Terhune, 619 F.3d 1080 (9th Cir. 2010). In *Hurd*, the Ninth Circuit Court of Appeals stated:

> That silence may not require police to end their interrogation, but it also does not allow prosecutors to use silence as affirmative evidence of guilt at trial. *Thompkins* stands for the proposition that a voluntary confession should not be suppressed just because a defendant has refrained from answering other questions. It does not alter the fundamental principle that a suspect's silence in the face of questioning cannot be used as evidence against him at trial, whether that silence would constitute a valid invocation of the "right to cut off questioning" or not.

Id. at 1088 (citation omitted).

In the past, silence could mean many different things, although it was often a virtue.[115] Today, silence in response to a question is still patently ambiguous, but within the new technology context, it is more of a signifier of withdrawal or nonparticipation than ever before, especially with a blurring of cultural and globalized understandings.[116] In business, persons might be expected to respond to texts and other inquiries within twenty-four hours[117] and email within forty-eight hours.[118] With friends and family, the response time expectations often increase, leading to expectations of knowing where others are located at all times.[119]

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[114] Bruneau, *supra* note 3, at 77.

[115] *See id.* More than 2000 years ago, Syrus said, "Let a fool hold his tongue and he will pass for a sage." *Id.*

[116] *See generally*, Evgeny Morozov, *Texting Toward Utopia: Does the Internet Spread Democracy?*, BOSTON REV., Mar.-Apr. 2009, at 19 ("Regime change by text messaging may seem realistic in cyberspace, but no dictators have been toppled via *Second Life* . . . ."); DONNA REID & FRASIER REID, INSIGHTS INTO THE SOCIAL AND PSYCHOLOGICAL EFFECTS OF SMS TEXT MESSAGING (2004), *available at* http://www.160characters.org/documents/SocialEffectsOfTextMessaging.pdf (last visited Feb. 25, 2011).

[117] There are many Web-sites dedicated to texting etiquette. *See, e.g.*, The Wireless Developer Network, *Top 10 list of SMS etiquette*, *available at* http://www.wirelessdevnet.com/newswire-less/thefeature04.html (last visited Feb. 8, 2011).

[118] *See, e.g.*, Joe Porter, Social Media & Email Expected Response Time, *available at* http://www.joeporter.me/social-media-expected-response-times (last visited Feb. 8, 2011); *see also* Emailreplies.com, *available at* http://www.emailreplies.com/ (last visited Feb. 8, 2011) (providing detailed instruction on email etiquette).

[119] *See, e.g.*, William C. Rhoden, *Vince Young Has Gone From Stardom to the Shadows*, N.Y. TIMES, Nov. 24, 2008, *available at* http://www.nytimes.com/2008/11/24/sports/ football/24rhodensot.html. In 2008, people thought NFL quarterback Vince Young was possibly suicidal when, after he left his cell phone at home, could not be reached by his mother and then his coach. *Id.*

For many, speech and silence are counterparts, necessarily intertwined,[120] giving each other reflected meaning.[121] In light of the increasing cacophony and meanings of speech, silence also can be seen as possessing different layers and meanings upon a closer look.[122] Silence can be differentiated from silences. Silence can be seen as an omission, a lack of speaking. Silences, however, can be distinguished as intermittent periods of quiet that can attach as a natural part of a conversation.[123] Silences, often brief, can reflect action through active listening and evaluation of sensory inputs. Further, deep silence has yet additional connotations, suggesting an exploration of one's inner self, occurring through meditation or other less-structured methods.[124]

Consequently, sustained silence in the face of questioning more likely reveals an intentionality to disconnect and be silent when assessed in an era of impulsive, unreflective, unfiltered Internet discussions, than it did prior to the technological connections now available.[125] The proliferation, availability, and impact of these technologies cannot be ignored.

New Technologies

New technologies, providing different ways to communicate and stay connected, seem to be developed monthly, if not more often. Several of these mechanisms have swept across countries and cultures, including the vocabulary that describes them, such as "going viral." Some of the more significant technologies to emerge, impacting the traditional dialogical conversation and the concept of connectedness, are described below.

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[120] Kris Acheson, *Silence as Gesture: Rethinking the Nature of Communicative Silences*, 18 COMM. THEORY 535, 535 (2008).

[121] The comparison can suggest speech and silence reside in harmony or conflict. For example, Jacques Derrida noted that: "Silence plays the irreducible role of that which bears and haunts language, outside and *against* which alone language can emerge—'against' here simultaneously designating the content from which form takes off by force, and the adversary against whom I assure and reassure myself by force." *Id.* at 536 (quoting JACQUES DERRIDA, WRITING AND DIFFERENCE 54 (Alan Bass trans., Univ. of Chicago Press 1980) (1967)) (emphasis in original).

[122] *Id.* at 549.

[123] *See, e.g.*, Bruneau, *supra* note 3, at 77-78.

[124] This concept of enlightened silence still remains. People who retreat into the wilderness or go on prolonged meditation retreats or take vows of silence for religious reasons all engage in deep silence. *Id.* at 77.

[125] Further, the visibility the technology now offered provides an important safeguard to minimize coercion.

Mobile phone networks, for wireless cellular phones, were developed in the 1970s, initially as an effort to create radiophones or two-way radios.[126] These phones were run on digital signal processors (DSP), a single chip, capable of more than five million operations a second.[127] The second generation of wireless cellular phones, sometimes denoted as "2G," really launched widespread usage of such phones around the turn of the millennium, with thousands of new users a day.

Electronic games, such as video games, are based on platforms and derive from the development of computers by research scientists and computer programmers. A scientist named William Higinbotham at the Brookhaven National Laboratory developed a video tennis game in the 1960s to entertain visitors.[128] As has been noted, "Over the past 30 years, video games have become an integral part of our culture, and the video game industry has become a multi-billion dollar behemoth."[129]

Video games can be accessed on cellular phones, computers and other electronic sources. They can be used at any time of day or night—making entertainment just a fingertip away.

Internet blogging, or micro-broadcasting, allows everyone to become a journalist and to blast their opinions to others world-wide and instantaneously. Blogs can be focused on a single subject or on a wide variety of topics. These blogs can be the equivalent of the age-old private journal, just shared publically with others, or an interplay between several "columnists."

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[126] *History of Cellular Mobile Communications*, MOBILE OPERATORS ASSOCIATION, *available at* http://www.mobilemastinfo.com/history-of-mobile-cellular-communication/history-of-cellular-mobile-communications.html (last visited Feb. 25, 2011). For example, in 2008 there was an estimated eighty million mobile connections in the United Kingdom, with more than four million customers. *Id.*

[127] Tom Farley, *Mobile Telephone History*, PRIVATE LINE, *available at* http://www.privateline.com/PCS/history9.htm (last visited Feb. 25, 2011).

[128] Allen Butler, *The Origins and History of Video Games*, ASSOCIATED CONTENT, Aug. 26, 2005, *available at* http://www.associatedcontent.com/article/9136/the_origins_and_history_of_video_games.html (last visited Feb. 25, 2011).

[129] *History of Gaming: A Look at How It All Began*, PBS, *available at* http://www.pbs.org/kcts/videogamerevolution/history/index.html (last visited Feb. 25, 2011).

Instant messaging and texting are two phenomena currently sweeping across cultures and geographical boundaries, although localizing generationally more in younger groups, such as teenagers. These forms of communications, primarily occurring on cellular phones and computers, allow for real-time, instantaneous, and efficient conversations.

Perhaps the most impactful area of new technologies involves social media sites. One of the most significant to date is Twitter. Twitter is an on-line individual communication service that is a cross between a social networking platform and a news outlet on an individual scale. Twitter allows everyone to become a member of the media, to become a micro-blogger, if only to answer the question, "What am I doing now?" Twitter has had a broad-ranging impact. Jurors and parties to lawsuits have used Twitter with the effect of disrupting trials. Others have used the site for positive outcomes, sending out distress calls or seeking creative and prompt responses to emergency situations. Celebrities, such as Shaquille O'Neal, have used the site to cultivate a following and stay in the limelight.[130]

Facebook is the most popular of a wide variety of social media sites, including MySpace, and others.[131] People post pictures and comments to interact on a daily basis with their on-line friends. "Friending" others on the site provides access and a glimpse into the lives of others, changing the definition of "friends" into a remote yet still potentially intimate interface.

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[130] *See, e.g.*, *THE_REAL_SHAQ*, TWITTER, *available at* http://twitter.com/the_real_shaq (last visited Feb. 25, 2011) ("Get short, timely messages from THE_REAL_SHAQ. Twitter is a rich source of instantly updated information. It's easy to stay updated on an incredibly wide variety of topics. Join today and follow @THE_REAL_SHAQ.").

[131] *See The 1000 Most-Visited Sites on the Web*, GOOGLE, *available at* http://www.google.com/adplanner/static/top1000 (last visited Feb. 25, 2011); *see also* FACEBOOK, http://www.facebook.com (last visited Feb. 25, 2011).

Transformation of Relationships

These technologies are more than just occupiers of time, but instead affect how we conduct our communicative relationships with others. The impact has the potential to be generational, cultural and psychological. Dr. Adam Cox, a psychologist who regularly works with adolescents, has observed:

> As the synaptic mindscape of daily life becomes increasingly marked by peaks and the disappearance of valleys, we might reasonably expect to see some signs of distress among the hyper-stimulated. But that doesn't seem to be the case. Instead, we are witnessing an adaptation so massive and rapid that it raises the question of where disorder really lies: when the Centers for Disease Control and Prevention estimate that many millions of Americans meet the diagnostic criteria for Attention-Deficit/Hyperactivity Disorder, this putative disorder is arguably no longer a disorder at all—it's just the way we are.[132]

Dr. Cox further noted, "Fifty years ago, the onset of boredom might have followed a two-hour stretch of nothing to do. In contrast, boys today can feel bored after thirty seconds with nothing specific to do."[133]

Constant Connectedness ("24-7")

People can be connected to others twenty-four hours a day, seven days a week, whether hiking in the wilderness, driving to a store, or engaged in several other endeavors, such as studying, watching a sporting or cultural event, or eating a meal. Signs saying "please turn off cell phones" permeate society; a commonplace accessory is the cell phone case worn on the belt.

As a result of the opportunity to connect, true silence—or lack of a connection—is becoming the exception, not the norm. People walking in a city in a crowd of strangers can be having a conversation with friends or family; those watching a film can receive and send text messages throughout; and people can blast progress reports or current thoughts to thousands of people following them on Twitter. A significant corollary or by-product of the ability to maintain constant connections and be assuaged by multiple stimuli is the notion of multi-tasking—doing several things at once.[134]

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[132] Adam J. Cox, *The Case for Boredom: Stimulation, Civility, and Modern Boyhood*, 27 NEW ATLANTIS 122, 124 (2010), *available at* http://www.thenewatlantis.com/publications/the-case-for-boredom (last visited Feb. 25, 2011).

[133] *Id.* at 123.

Immediacy

The use of texting and instant messaging has created a new vocabulary ("lol") and new forms of real-time communications. By pressing the send button, people can without deliberation create a lasting statement to others in a way they could not through other forms of non face-to-face communications like letter writing. Emoticons, like the common "smiley" face, can be sent as an entire message, and people write in a shorthand particularly suited to the era of almost-real-time conversations that are technically asynchronous. With smartphones having keyboards built in or instantly accessible, expectations for a quick or immediate answer have become commonplace.

Cross-Cultural Connections

As a result of the Internet and instantaneous connections around the world, such as through the site, Skype, which permits real-time video communication globally, different realities are becoming shared and cross-cultural lines blurred.[135] Individuals can see, feel, and learn about faraway places from their own living rooms, receiving a steady diet of information that in recent decades would have been available only at great time and expense. This has had significant cultural implications, creating and transposing existing cultures because of connections that would not have arisen due to geographic, relational, and other boundaries.[136]

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[134] At least one study shows, reflecting intuition, that dividing one's attention in multiple ways diminishes the competency with which people attend to each task. *See* A. Gorlick, *Media Multitaskers Pay Mental Price, Stanford Study Shows*, STANFORD REPORT (August 24, 2009) http://news.stanford.edu/news/2009/august24/multitask-research-study-082409.html.

[135] The cultural anthropologist, Clifford Geertz, wrote that law is "a distinctive way of imagining the real." Clifford Geertz, *Fact and Law in Comparative Perspective*, *in* LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167, 173 (3d ed. Basic Books 2000). The opportunity to connect with, observe and even participate in differing cultures and social organizations provides numerous additional ways of "imagining the real."

THE NEW SILENCE AND THE IMPLIED INVOCATION AND WAIVER OF THE FIFTH AMENDMENT RIGHT TO REMAIN SILENT

The implications of the new technologies are many, but at a minimum, have forced a reconstructed understanding of silence in a way not taken into account by the Supreme Court in the *Thompkins* case.[137] In short, these technologies transform the traditional context of incommunicado interrogation as discussed in *Miranda* and the meaning of a suspect's silence in the face of interrogation. This section advocates both an invocation and waiver analysis of the Fifth Amendment right to remain silent that considers silence as a presumptive refusal to participate in a dialogue with the interrogators, generally the police, within a reasonable time after the commencement of the interrogation. This reasonable time should be measured in minutes, not hours, and understand the modern contexts of conventionality in dialogue and Web-era connectivity. Further, the burden carried by the prosecution to show waiver should be substantial, and not require an unambiguous statement of cease and desist as indicated by Justice Kennedy: "Thompkins did not say that he wanted to remain silent or that he did not want to talk to police. Had he made either of these simple, unambiguous statements, he would have invoked his 'right to cut off questioning.'"[138] Thus, silence should carry inferential weight, and not be considered as it was in *Thompkins*, merely a neutral placeholder.[139]

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[136] For example, a wide variety of political groups have been sustained because of the Internet, allowing for quick and efficient connections between people who otherwise would not have had such relationships.

[137] Comparatively, because of the proliferation of information from these technologies is a widespread knowledge about the Fifth Amendment right to remain silent. There are numerous police television dramas, police reality shows, *Court TV* shows, and Web sites that talk about the right to remain silent. While individuals know more about the right, there is no indication they know that invocation of the right requires an affirmative act—or that waiver can occur from their own statements.

Context

Context matters to the implied waiver of rights. Context in interrogation includes the layout and size of the room, the number and experience of interrogators, the nature of the crime, the background of the suspect, the duration of the interrogation and more.

With the existence of a waiver by implication, the default position for a waiver becomes all the more important.[140] The default position, meaning the position that is minimally sufficient to trigger a change in outcome, such as more than fifty percent for the preponderance of evidence standard, is especially critical with the invocation and waiver of constitutional rights. The default position sets the status quo, reflects settled expectations, and sets boundaries for the relationship between the government and individuals.

For example, the Court in *Thompkins*, appeared to use the same default position for waiver regardless of the length of the questioning or the physical space in which it occurred, among many other factors. The context of incommunicado questioning, while permissible, should be looked at closely and the course of conduct language of *Butler* taken seriously. In today's day and age, videotape, audiotape, and other confirmations[141] of context can be readily made and preserved.[142] While the result of the *Thompkins* case might still be the same after a serious consideration of context, it would at least be reached after a rigorous sifting of the relevant contexts.

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[138] Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (quoting Miranda v. Arizona, 384 U.S. 436, 474 (1966)).

[139] While this inference might not have changed the outcome in *Thompkins*, since he did apparently participate in the discussion periodically, it would require a closer examination of the context and to at least give some value to his silence.

[140] The concept of waiver is different than an exception, where the right does not attach under particular circumstances, such as in a grand jury proceeding, impeaching a testifying accused. *See, e.g.,* Harris v. New York, 401 U.S. 222 (1971); or public safety, *see, e.g.*, New York v. Quarles, 467 U.S. 649 (1984).

[141] While a requirement of corroboration can be onerous, the concept of "instant replay" and transparency are rising throughout society, from sports replays to traffic light intersections supported by cameras.

Implications of the Context of a New Silence

Silence can and should have implications in our society, at least within the contours of the Fifth Amendment. The notion of silence is the right not to implicate oneself, but it is more than that. In a legal framework that values critical thinking, silence provides the opportunity to desist from impulsive, unfiltered thinking and instead engage in deliberative, reflective analysis.[143] The importance of this concept is paralleled in the jury's job to consider all of the evidence before rendering a verdict. Further, in an era of constant connectedness, it is reasonable to infer that sustained silence in the face of interrogation is a "knowing" silence that indicates an intention to not participate in the dialogue. While falling within Fourth Amendment analysis, *Katz v. United States* is instructive when it states, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[144]

In viewing boredom for today's youth as a positive thing, the psychologist, Dr. Cox, said: "But the occurrence of boredom in young minds would be a welcome sign in one respect—it would suggest the presence of available resources for thought, reflection, and civil behavior."[145] This conceptualization corroborates the idea of free will and noncoercion reflected in *Miranda* and forsaken in *Thompkins*. Given the impulsivity of speech evidenced in today's world by a variety of notorious Twitter statements alone,[146] at least an inference can be drawn that someone born digital who is engaged in a course of sustained silence likely intends that silence and is not merely waiting to pick a point to participate in the conversation.

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[142] *See, e.g.*, S. Kossin, S. Appleby, & J. Perillo, *Interviewing Suspects: Practice, Science and Future Directions*, 15 LEGAL AND CRIMINOLOGICAL PSYCHOLOGY 39 (2010 British Psychological Society). cf, G. D. Lassiter, S. Diamond, H. Schmidt, and J. Elek, "Evaluating Videotaped Confessions: Expertise Provides No Defense Against the Camera-Perspective Effect," 18 Psychological Science 224 (2007 Association for Psychological Science).

[143] *See, e.g.*, HENRY DAVID THOREAU, WALDEN; OR, LIFE IN THE WOODS (1854). Observe the functional equivalency of silence in Thoreau's choice to retreat from society and live at Walden Pond by himself. *Id.* Thoreau wanted to live in the woods and think deliberatively.

[144] 389 U.S. 347, 351 (1967).

[145] Cox, *supra* note 132, at 124.

Thompkins did not stay true to *Butler*'s course of conduct standard, which takes into account action over time. In *Thompkins*, the applicable time was only at the point the suspect spoke—not the entire conduct taken as a whole from the giving of *Miranda* warnings onward. If that was done, a different narrative likely would have resulted. How many people, isolated from friends, family and trusted connections like cell phones, would have remained silent after more than two hours of incommunicado questioning by police, let alone two questions? How many people would have been able to sit still for more than two hours? This lack of participation in today's digital era must count for something in the constitutional evaluation of whether the right to remain silent was first invoked, and then waived.

A Right One Must Sign-Up For

Further, *Thompkins* changed the right to silence insofar it effectively required one to "sign-up" for it, much like a subscription to a magazine or to access the content of an on-line Web site.[147] The warning about the right to remain silent thus lies outside of the new conventionality, in that it misleads the recipient into believing they have such a right—without articulating that it must be affirmatively asserted, such as texting, "I accept." If the *Thompkins* interpretation prevails, the warnings should change to, "You have the right to remain silent, but only if you assert it." This modification conforms at least with the intent of *Miranda* to place a heavy burden on the prosecution to show a waiver occurred.

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[146] For example, the lawsuit brought against Courtney Love for defamation for statements she made on Twitter about designer Dawn Simorangkir. J. Luerssen, "Courtney Love's Twitter Defamation Lawsuit Costs Her $430,000." www.spinner.com (March 4, 2011); *see also*, "Can't say no one makes money from Twitter now. The NBA does." Twitter statement by Mark Cuban, owner of the Dallas Mavericks basketball team, after being fined $25,000 by the NBA for statements he made on Twitter about officiating.

[147] While this right is leveraged more than the Fourth Amendment waiver of the right to unreasonable searches or seizures, which can be effectively waived without knowing there is a right to say no, if the orthodoxy of values places the right to remain silent with the most significant of rights, the Court will go further to protect it.

CONCLUSION

Post-*Miranda* silence in a digital age of constant stimuli and connectivity has a new conventionality and meaning. This is an era of rapidly changing communication norms, where incommunicado questioning for prolonged periods has especially pernicious, if not subtle, tendencies toward coercion. The Court in *Thompkins* ignored the implications of context for the invocation and implied waiver of constitutional rights, particularly the specific factors involving the duration of the interrogation and the new normal of asynchronous, immediate and impulsive, unfiltered communication. The Court should reexamine its approach before it obliterates the sounds of silence.

SECRET WITNESSES, SECRET INFORMATION AND SECRET EVIDENCE: AUSTRALIA'S RESPONSE TO TERRORISM

Miiko Kumar[*]

INTRODUCTION

Since 2001, the Australian Parliament has enacted over forty pieces of legislation in response to terrorism.[1] The states and territories of Australia referred legislative powers to the Australian Commonwealth government to enact and codify terrorism offenses.[2] The offenses are aimed at individuals who engage in, train for, prepare, plan, finance, or provide support for terrorist acts. The legislation also allows for terrorist organizations to be declared illegal and individuals who are members or support a "terrorist organization" can be charged with an offense.[3] These amendments to Australia's substantive criminal law were accompanied by substantial amendments to extend powers of law enforcement agencies.[4] Further legislation was enacted to prevent the disclosure of information that could harm national security.[5] The enormous raft of legislative reforms also included the creation of control and preventative detention orders.[6]

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[*] Senior Lecturer, Faculty of Law, University of Sydney.

[1] From 2002 to 2007, the Australian Parliament enacted forty-four separate terrorism statutes. The most significant being the *Security Legislation Amendment (Terrorism) Act 2002* (Cth.) which created a range of terrorist offenses which includes conduct in preparation of a terrorist act. Security Legislation Amendment (Terrorism) Act, 2002, (Cth.). This focus on prevention was reinforced by the *Anti-terrorism Act 2005* (Cth.) which provides that an offense is committed even if "a terrorist act does not occur." Anti-terrorism Act, 2005, (Cth.) *available at* www.nationalsecurity.gov.au.

[2] The terrorism offenses are contained in Australia's Federal *Criminal Code 1995* (Cth.), part 5.3. The states and territories have enacted complimentary law enforcement powers in their own legislation. Criminal Code, 1995, p. 5.3 (Cth.).

[3] The list of terrorist organizations is in Part 2 of the *Criminal Code Regulations 2002.* Criminal Code Regulations, 2002, p. 2 (Cth.). There are currently nineteen organizations listed as "terrorist organizations" on the Australian Government National Security website. *See* http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument.

[4] In particular, the 2002 and 2003 amendments to the *Australian Security Intelligence Organisation Act 1979* (Cth.) allow for questioning of people over sixteen years of age for up to twenty-four hours (forty-eight hours if there is an interpreter) and deten-

These substantial legislative amendments have been the focus of criticism due to concerns that they compromise the fundamental rights of citizens.[7] Criticisms have focused on the perceived lack of balance between the need to protect national security and the protection of civil rights. For example, the Australian national intelligence agency (called the Australian Security Intelligence Office ("ASIO")) now is able to compulsorily detain and question a person if it believes that there are reasonable grounds for believing that the person will substantially assist in the collection of intelligence in relation to a terrorism offense. This is a wide-reaching power as it only requires that "there are reasonable grounds for believing [that the questioning] will assist in the collection of intelligence," ASIO does not have to believe that there are reasonable grounds for believing that the person actually committed an offense,[8] and significantly their power extends to the detention of non-suspects. A person can be detained for up to one week.[9] Importantly, these powers abolish the privilege against self-incrimination and severely compromise a person's right to legal advice.[10]

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tion without charge for one week. Australian Security Intelligence Organisation Act, 1979, (Cth.) [hereinafter ASIOA 1979]. The amendments added in 2004 permit Australian Federal Police to question terrorist suspects up to twenty-four hours. *Id.*

[5] National Security Information (Criminal and Civil Proceedings) Act, 2004, (Cth.).

[6] *See* Criminal Code Act, 1995, Div. 104 & 105 (Cth.). These powers were introduced in 2005.

[7] *See* Andrew Palmer, *Investigating and Prosecuting Terrorism: The Counter-Terrorism Legislation and the Law of Evidence*, 27 U.N.S.W.L.J. 373 (2004); Anthony Reilly, *The Processes and Consequences of Counter-Terrorism Law in Australia: 2001-2005*, 10 FLINDERS J. OF L. REFORM 81 (2007); ANDREW LYNCH & GEORGE WILLIAMS, WHAT PRICE SECURITY? TAKING STOCK OF AUSTRALIA'S ANTI-TERROR LAW (2006).

[8] ASIOA 1979, *supra* note 4, at § 34D.

[9] *Id.* § 34S.

[10] The right to legal representation is compromised as there is no right to have a lawyer present during questioning. And, if a lawyer is present and ASIO deems that the lawyer is disruptive, then ASIO can order the lawyer's exclusion. Further, it is an offense for the lawyer to communicate with a third party any information relating to

Since the wave of legislative reform in response to terrorism, there have been a total of thirty-eight people who have been prosecuted or are being prosecuted for terrorism offenses under the Australian Federal Criminal Code.[11] From these, twenty people have been convicted of terrorism offenses and other prosecutions are ongoing.[12] Others have been abandoned.[13]

The fundamental principles that govern criminal trials are open justice, fairness to the accused, and the rights of the accused to confrontation of the evidence. These values appear to be compromised in the Australian terrorism trials. This article aims to examine the extent to which terrorism trials conducted in Australia have undermined these principles by the use of anonymous witnesses, the non-disclosure of intelligence, and the use of secret evidence in applications to restrict the liberty of the accused. Further, this article argues that this compromise demonstrates the need for Australia to adopt a bill of rights.[14]

The first part of this article will refer to the core values of criminal process. These values are the right to a public hearing, the right to a fair trial, and the right to confrontation. These three rights are usually contained in a nation's human rights statute. However, in the absence of such legislation, the

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the detention or questioning; this offense is punishable for up to five years. *Id.* § 34ZR. ASIO can also monitor contact between a subject and their lawyer. *Id.* § 34.

[11] *Counter-Terrorism White Paper: Securing Australia – Protecting Our Community*, 2010, COMMONWEALTH OF AUSTRALIA, ii.

[12] *Id.*

[13] For example, in *R v. Ul-Haque*, the prosecution was terminated after the trial judge ruled that police records of the interview were inadmissible due to the oppressive conduct by the enforcement officers. R v. Ul-Haque (2007) 177 A. Crim. R. 348. The judge found that the officers committed offenses of false imprisonment and kidnapping at common law. *Id.* at 368.

[14] Australia does not have a national charter or bill of rights. It is noted that there are two human rights statutes in two Australian jurisdictions. The *Charter of Human Rights and Responsibilities Act 2006* (Victoria) and the *Human Rights Act 2004* (ACT) both include a right to fair and open hearing in very similar terms to Article 14 of the *International Covenant on Civil and Political Rights.* Charter of Human Rights and Responsibilities Act, 2006, (Vict.); Human Rights Act, 2004, (Austl. Cap. Terr.); International Covenant on Civil and Political Rights, 1976, (U.N.). However, these acts do not bind the Commonwealth of Australia.

rights are broadly, and vaguely, contained in Australia's common law.

The second part of this article will examine the role of secret witnesses in criminal trials generally, and specifically in two terrorism trials. It will be observed that Australian courts have generally allowed witness anonymity without considering the infringement of the accused's right to confrontation. The Australian approach in this respect will be compared with European jurisdictions. The comparison will show that the Australian position is unregulated and is in need of reform.

The third part of this article will examine the court's role in preventing disclosure of information to the accused that may harm national security. It is argued that the government's statutory regime (enacted after 2001) to weigh national security more favorably than the rights of the accused is not warranted as the pre-existing public interest immunity doctrine (developed in Australia's common law[15]) adequately performed that task. The result of this statutory regime has only appeared to be a "delay and disturbance" for terrorism trials.[16] But, more importantly, the regime gives the right of a fair trial less importance than the protection of national security.

Finally, the article will briefly refer to the use of secret evidence to secure preventative detention or control orders which restrict the ability of the person subjected to the order from testing its evidentiary basis.

PART 1: PRINCIPLE VALUES OF CRIMINAL PROCESS

1.1 Principle of open justice

A public hearing is one of the most fundamental aspects of justice. The common law of Australia provides that proceedings may be conducted in the absence of the public only where "the nature or the circumstances of the particular proceedings are such that a public hearing would frustrate or render impracticable the administration of justice."[17] In such circumstances, the principle of open justice must yield to the more fundamental principle that the chief object of courts is to ensure that justice is done. The test is one of necessity, namely, whether it is "really necessary to secure the proper administration of justice" in the proceedings.[18] The necessity for such measures would arise only in "reasonably necessary" circumstances, not merely where such measures would be useful or desirable[19] and would save embarrassment, distress or financial loss.[20]

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[15] The law of public interest immunity is now codified in section 130 of Australia's uniform evidence legislation. *See* Evidence Act, 1995 (Cth.); Evidence Act 1995 (N.S.W.); Evidence Act, 2001 (Tas.); Evidence Act, 2004 (N.I.); and Evidence Act, 2008 (Vic.).

[16] Anthony Whealy, *Difficulty in Obtaining a Fair Trial in Terrorism Cases*, 81 AUSTL. L.J. 743, 748 (2007).

The phrase "necessary to secure the proper administration of justice in the proceedings" does not mean that if the relevant order is not made, the proceedings will not be able to continue. It means that if the relevant order[21] is not made, the result will be, or will be assumed to be, that an unacceptable consequence will flow to the administration of justice. The power to make such orders is an inherent power of a superior court and in statutory courts the power to make closed court orders is to be implied as necessary to the proper function of the court.[22]

The Australian position demonstrates that the test of necessity does not confer a general discretion to balance the principle of open justice against the avoidance of harm likely to be caused by disclosure.[23] The cases have utilized a strict approach for the categories of cases where there are exceptions to open justice. These categories are few and "strictly defined"[24] and "courts are loathe to expand the field."[25] The well-established categories are to protect the identity of an informer,[26] to protect the identity of victims of blackmail,[27] and to protect matters of national security.[28] Australian courts have resisted extending these categories, for example, to prevent the publication of police evidence relating to police techniques employed to obtain confessions.[29]

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[17] Mirror Newspapers Ltd. v. Waller (1985) 1 N.S.W.L.R. 1, 13; John Fairfax Publ'ns Pty Ltd. v. Dist. Ct. of N.S.W. (2004) 148 A. Crim. R. 522.

[18] John Fairfax & Sons Pty Ltd. v. Police Tribunal of NSW (1986) 5 N.S.W.L.R. 465, 476-77; John Fairfax Group Pty Ltd. v. Local Ct. of NSW (1991) 59 A. Crim. R. 68, 95; John Fairfax Publ'ns Pty Ltd. v. District Ct. of NSW (2004) 148 A. Crim. R. 522.

[19] John Fairfax Publ'ns Pty Ltd. v. Ryde Local Ct. (2005) 152 A. Crim. R. 527, 537.

[20] Attorney-General (NSW) v. Mayas Pty Ltd. (1988) 36 A. Crim. R. 345, 347; *John Fairfax Group Pty Ltd.*, (1991) 59 A. Crim. R. at 77.

[21] The relevant order could be an order that the court be closed to the public, and/or proceedings be the subject of a non-publication order, and/or witnesses give evidence under pseudonym and possibly with screening devices.

[22] *John Fairfax Group Pty Ltd.*, (1991) 59 A. Crim. R. at 96; BUSB v. R (2011) N.S.W.C.C.A. 39.

[23] *John Fairfax Group Pty Ltd.*, (1991) 59 A. Crim. R. at 95; Attorney-General (NSW) v. Nationwide News Pty Ltd. (2007) 178 A. Crim. R. 301, 305.

However, for terrorism trials, even though the protection of national security is a recognized common law category for a departure from open justice, the Australian Parliament has provided specific legislation to give, in a sense, double protection to permit the government to make orders in the interests of national security.[30]

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[24] The Queen v. Tait (1979) 46 F.L.R. 386, 401; McPherson v. McPherson (1936) A.C. 417, 200; Russell v. Russell (1976) 134 C.L.R. 495, 520; *John Fairfax Group Pty Ltd.*, (1991) 59 A. Crim. R. at 78; *John Fairfax Publ'ns Pty Ltd.*, (2004) 148 A. Crim. R. at 531.

[25] Raybos Australia Pty Ltd. v. Jones (1985) 2 N.S.W.L.R. 47, 55. While the categories are strictly defined at common law, they are not absolute and may be extended to categories "closely analogous" to the existing categories. In *R v. Kwok*, the NSW Court of Criminal Appeal held that non-publication orders may be made in respect of complainants in cases of placing people in sexual servitude. R v. Kwok (2005) 158 A. Crim. R. 160. The position of victims of such offenses was regarded as closely analogous to victims of blackmail. *Id.* at 168.

[26] Marks v. Beyfus (1890) 25 Q.B.D. 494, 498; Cain v. Glass (1985) 3 N.S.W.L.R. 230; Witness v. Marsden (2000) 49 N.S.W.L.R. 429; Attorney-General (NSW) v. Stuart (1994) 75 A. Crim. R. 8.

[27] R v. Socialist Worker Printers & Publishers Ltd.; *Ex parte* Att'y Gen. (1975) 1 Q.B. 637.

[28] *See generally* Mirror Newspapers Ltd. v. Waller (1985) 1 N.S.W.L.R. 1, 19D (Hunt, J.); *John Fairfax Group Pty Ltd.*, 59 A. Crim. R. at 81.; *John Fairfax Publ'ns Pty Ltd.*, (2004) 148 A. Crim. R. at 536.

[29] *In re* Application by Chief Comm'r of Police (Vic) for Leave to Appeal (2004) 9 V.R. 275; New South Wales Comm'r of Police v. Nationwide News Pty Ltd. (2007) N.S.W.C.A. 366.

[30] The *Criminal Code Act 1995* (Cth.) allows the court to close the court and make non-publication orders or access orders in respect of the court record/file "if satisfied that it is in the interest of the security or defense of the Commonwealth." Criminal Code, 1995, § 93.2 (Cth.).

1.2 Right to a fair trial

An accused's right to a fair trial can be found in the common law of Australia. The right to a fair trial and the power of the court to stay proceedings to prevent an unfair trial was considered by the High Court of Australia in *Dietrich v. The Queen.*[31] It has been observed that Australian jurisprudence recognizes a "principle of a fair trial" rather than a codified right to a fair trial which is based on the inherent power of a court to control its process and prevent an abuse of its processes.[32]

Australia does not have a human rights instrument that is present in many common law countries in the world, such as the United States, United Kingdom, Canada, New Zealand, and South Africa. There has been debate about whether Australia should enact such legislation.[33] However, the Australian government has recently reported on "Australia's Human Rights Framework" and it appears that the government has now decided against such a course.[34] This is unfortunate.

In the Australian terrorism trials to date, it appears that the fairness to the accused has been a dominant consideration.

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[31] Dietrich v. The Queen (1992) 64 A. Crim. R. 176. This is a case where the High Court stayed proceedings for an unrepresented accused, on trial for a serious criminal matter, as his trial would be unfair without legal representation. *Id.* at 377.

[32] James Spigelman, *The Truth Can Cost Too Much: The Principle of a Fair Trial*, 78 AUSTL. L.J. 29, 30-31 (2004).

[33] *See, e.g.*, Brian Galligan, *Rights Protection: the Bill of Rights Debate and rights protection in Australia's states and territories*, 28 ADEL. L. REV. (2007); Michael McHugh, Does Australia Need a Bill of Rights? (speech presented to the NSW Bar Association, Sydney, Aug. 8, 2007) *available at* http://www.nswbar.asn.au/docs/resources/lectures/bill_rights.pdf; Gerard Brennan, Constitution, Good Government and Human Rights (speech delivered at the Human Rights Law Resource Centre, Mar. 12, 2008, Melbourne) *available at* www.hrlrc.org.au; Michael Kirby, The National Debate About a Charter of Rights and Responsibilities – Answering Some of the Critics (speech presented at the Law Institute of Victoria President's Luncheon, Melbourne, Aug. 21, 2008).

[34] Commonwealth of Australia, *Australia's Human Rights Framework* (Canberra, 2010) *available at* http://www.ag.gov.au/humanrightsframework. On June 2, 2010, the federal government introduced the *Human Rights (Parliamentary Scrutiny) Bill 2010* which establishes a Joint Parliamentary Committee on Human Rights to examine and report to Parliament on the compatibility of legislation with Australia's international human rights obligations. This bill makes it clear that the adoption of a bill of human rights is not on the Australia government's agenda.

Some examples of potential prejudice identified in these trials have been:[35]

- A danger that the jury would be prejudiced against Muslims.[36]
- A danger that the security in the court room may cause an unfair trial.[37]
- A danger that the publicity from the convictions in overseas terrorist trials may prejudice the defendants' trial.[38]
- A danger that the publication of proceedings in one state may prejudice proceedings in another state.[39]

1.3 Right to confrontation

The right of an accused to confront his or her accusers is recognized as "one of the most important rights of the accused."[40] In Australia, the right is not in the form of a specific constitutional right such as the United States' Sixth Amendment nor does Australia have a statute that provides a "right to examine witnesses" such as Article 6 of the European Convention.[41]

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[35] But note that these examples have not resulted in a finding of an unfair trial.

[36] The trial judge in *R v. Lodhi* has written about this problem. *See* Whealy, *supra* note 16, at 744. A direction was given to the jury in waiting and actual jury.

[37] R v. Benbrika [No. 12] (2007) V.S.C. 524 (the judge removed a perspex screen in the dock due to unfairness).

[38] R v. Elomar [No. 27] (2009) N.S.W.S.C. 985 (the judge refused an application to discharge the jury in respect of the publicity from the convictions of a terrorist trial in England).

[39] R v. Benbrika [No. 19] (2008) V.S.C. 48.

[40] References are found in Australian cases such as: Whitehorn v. The Queen (1983) 152 C.L.R. 657, [2] (Murphy, J.); R v. McHardie (1983) 10 A. Crim. R. 51, 57 ("[T]he procedure of a normal criminal jury trial provides for the presentation of the Crown case in the presence and hearing of the accused, and includes the right of the accused to test the evidence by cross-examination, either by himself, or by his legal representative."). *See generally* Ian Dennis, *The Right to Confront Witnesses: Meanings, Myths and Human Rights*, 4 CRIM. L. REV. 255, (2010).

[41] Note that the *Victorian Charter* and *Human Rights Act (ACT)* both contain provisions relating to the right to examine witnesses.

The importance of confrontation of witnesses is found in the common law, usually in cases concerning the admissibility of hearsay evidence.[42] In Australia, the right has been limited by allowing evidence to be admissible as an exception to the hearsay rule,[43] use of remote access and screens to give evidence, and pseudonym orders. The ability to confront witnesses has been subjected to these limits in the various terrorism trials by the use of anonymous witnesses.

PART 2: THE USE OF SECRET WITNESSES IN AUSTRALIA

2.1 Departures from open justice for witness protection

There are varying protective orders that can be made in respect of witnesses that give evidence in a trial. These orders limit disclosure of information and/or evidence to the parties and/or public. Such orders can limit the accused's right to confront witnesses. The court can depart from the principle of open justice by making orders to close the court, by prohibiting publication of evidence or access to information; by ordering that a witness gives evidence with a screen or via encrypted videolink or closed circuit television from a remote point to prevent the public and possibly also the accused from identifying the witness;[44] and/or making pseudonym orders.[45] Pseudonym orders can be made in circumstances where the accused is either aware or unaware of the true identity of the witness. The power of the court to depart from the principle of open justice and make the orders described above is on the basis that such orders are necessary in the interests of justice[46] or the power to make such orders may be in specific legislation.[47]

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[42] Lee v. The Queen (1998) 195 C.L.R. 594, 602 ("Confrontation and the opportunity for cross examination is of central significance to the common law adversarial system of trial.").

[43] *See* R v. Darmody (2010) V.S.C.A. 41.

[44] R v. Ngo (2003) 57 N.S.W.L.R. 55.

[45] Witness v. Marsden (2000) 49 N.S.W.L.R. 429; R v. Savvas (1989) 43 A. Crim. R. 331.

2.2 Use of public interest immunity to suppress information about witness identity

The doctrine of public interest immunity protects the disclosure of information (or prevents the admission of evidence) that relates to a matter of state. The court determines whether the public interest in the disclosure of the information is outweighed by the public interest in maintaining secrecy or confidentiality. The public interest in maintaining secrecy is demonstrated by proving that disclosure would injure some aspect of the public interest. For public interest immunity to apply, the harm to the public interest must outweigh the public interest in disclosure. Public interest immunity has been utilized by the state to claim that certain information not be disclosed to the defense;[48] or, that certain information not be tendered into evidence;[49] or, that the identity of a witness (including the physical appearance and name) not be disclosed to the public and/or the accused;[50] or, to seek closed court orders or other forms of suppression orders.[51]

It is clear that public interest immunity protects the identity of an informer who is not a witness.[52] An illustration of this principle can be seen in the case of *Cain v. Glass,*[53] where forty-two defendants were involved in a joint committal hearing[54] for charges of murder and affray in respect of seven deaths. All but one of the defendants was a member of a motorcycle organization. The defendants sought police records that contained material identifying confidential police informants (who were not witnesses in the committal). The police successfully prevented the defendants from accessing the records on the basis of public interest immunity as the records would identify informers. The public interest in suppressing the information was found to be greater than the public interest for disclosure.[55]

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[46] John Fairfax & Sons Pty Ltd. v. Police Tribunal of NSW (1986) 5 N.S.W.L.R. 465, 476-77; John Fairfax Group Pty Ltd. v. Local Ct. of NSW (1991) 59 A. Crim. R. 68, 95; John Fairfax Publ'ns Pty Ltd. v. District Ct. of NSW (2004) 148 A. Crim. R. 522.

[47] For example, section 93.2 of the *Criminal Code Act of 1995*, allows the court to close the court, make non-publication, or access orders in respect to the court record/file "if satisfied that it is in the interest of the security or defense of the Commonwealth." Criminal Code Act, 1995 (Cth.), § 93.2, (consolidated up to Act No.127 of 2010) [Austl.].

[48] Cain v. Glass (No. 2) (1985) 3 N.S.W.L.R. 230.

[49] R v. Smith (1996) 86 A. Crim. R. 308. A claim of public interest immunity was made in respect of the identities of police informers. *Id.* The court ordered that their true identities should be protected from the public and the accused by the use of pseudonyms and that there be no publication of the evidence which identified them. *Id.*

[50] *Id.*

[51] N.S.W. Comm'r of Police v. Nationwide News Pty. Ltd. (2007) 70 N.S.W.L.R. 643, [33].

[52] Marks v. Beyfus (1890) L.R. 25 Q.B.D. 494.

There is a distinction between the court ordering suppression of a witness' identity only to the public and the court ordering the suppression of a witness' identity to both the public and the accused (and possibly also to his or her lawyers). Both orders are departures from the principal of open justice; however, the non-disclosure of a witness's identity to the accused could restrict the accused's right to confront the anonymous witness by way of cross examination which could impact the accused's right to a fair trial.

In Australian law, there are some cases where the principle of open justice and doctrine of public interest immunity have been confused. For example, in determining whether public interest immunity applies to protect informers, judicial officers have weighed the desirability of open justice with the need to protect sources of police information.[56] This is not the focus of public interest immunity. A claim of public interest immunity requires a court to undertake a balancing exercise by considering the desirability of the information being disclosed (to assist the litigant in his/her case) against the public interest in maintaining confidentiality of the information (to protect a particular government interest). In another case, the government submitted that the evidence about confidential police methodology (given in open court) should not be subsequently published due to public interest immunity. The government submitted that the public interest in preserving confidentiality of the information should be balanced against the public interest in open justice.[57] Again, this is not the correct test to determine a departure from the open justice principle, and the submission was rejected by the court that heard it.[58]

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[53] *Cain,* 3 N.S.W.L.R. at 230.

[54] A committal hearing is a preliminary hearing to determine whether the matter will proceed to a criminal trial. This committal involved 42 defendants. *Id.* at 238.

[55] *Id.* at 243D (Priestley, J.). Justice McHugh found that, at common law, there was "no question of weighing competing public interests" when a claim is made for the name of an informer. *Id.* at 248A. However, the judicial approach is now a balancing test as set out in Australia's uniform evidence legislation at section 130. *See* Evidence Act 1995 (Cth.), § 130; Evidence Act 1995 (N.S.W.); Evidence Act 2001 (Tas.); Evidence Act, 2004 (N.I.); Evidence Act, 2008 (Vic.).

[56] R v. Smith (1996) 86 A. Crim. R. 308, 313. In this case the Magistrate incorrectly weighed the desirability of open justice with the need to protect sources of police information. The NSW appellate court stated that the correct approach was to weigh the public interest in preserving confidentiality against the public interest in the defendant

2.3 Anonymous witnesses in trials

The development of Australian law in respect to anonymous witnesses has not received the same scrutiny as it has in countries such as United Kingdom,[59] New Zealand,[60] and the United States.[61] There is not a unified approach in Australian

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accessing the information, and the making of a pseudonym order needed to be necessary for the administration of justice. *Id.* at 314.

[57] Att'y Gen. (N.S.W.) v. Nationwide News Pty. Ltd. (2007) 178 A. Crim. R. 301 (rejecting the argument made by the N.S.W. Commissioner of Police).

[58] *See id.*

[59] R v. Davis (2008) 1 A.C. 1128. The House of Lords overturned a conviction on the basis that the sole and decisive evidence to prove the conviction was from three anonymous witnesses. The legislature responded to this decision with a statutory framework to permit anonymous witnesses. *Id.*

[60] R v. Hughes [1986] 2 N.Z.L.R. 129. The New Zealand Court of Appeals held that the right of the accused to know the true identity of undercover police witnesses was so fundamental to the criminal trial that it could not be dispensed with. The government responded with legislation to permit undercover officers to testify under an assumed name provided that the Police Commissioner produces a certificate that the officer has no criminal convictions. Additionally, notice must be given of any adverse comments to the officer's credibility. Evidence Act, 1908 (N.Z.), § 13A (repealed by § 215 of Evidence Act, 2006 (2006 No. 69)).

[61] Alvarado v. Superior Court, 60 Cal. Rptr. 2d 854 (1997). The Superior Court of California concluded that the identities of the witnesses had to be disclosed to ensure "effective investigation and cross-examination of the witness." *Id.* at 861. The Confrontation Clause was heavily relied on.

law as to when anonymous testimony can be used. This point is made clearly by David Lusty in his article on anonymous witnesses. Lusty, in 2002, stated that there were "two diametrically opposed interpretations" on witness anonymity.[62] This situation remains unchanged. Further, Australian law has not developed to devise safeguards for when anonymous testimony can be used. In fact, the issue has not been considered by Australia's High Court, but rather the issue has been dealt with differently at the state level.

There are two main cases dealing with anonymous witnesses in New South Wales. In *R v Ngo*, two witnesses were called to prove the identification of the accused.[63] The accused, himself involved in politics, was on trial for the murder of a politician. Both witnesses gave evidence under pseudonym and via video link. The accused was prevented from seeing the faces of the witnesses. The trial judge ordered that the testimony be adduced via video link as he was satisfied that "the fears of the witnesses were genuine and that they would probably not give evidence if required to do so in the courtroom in the presence of the accused. He concluded that it was in the interests of the administration of justice to make the order."[64] One of the grounds of appeal relied on by Mr. Ngo was that "since issues of identity were involved, [he] should be entitled to see the witnesses because otherwise he would not have the opportunity to properly contest that evidence."[65] Mr. Ngo argued that as he was

> prevented from seeing the witnesses' faces, he could not instruct counsel as to whether he recognized them; and if he did, whether there were any matters which might affect their reliability or credibility. This was all the more so because the jury believed that the appellant could see the witnesses. The jury would assess the reliability of the witnesses on the as-

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[62] David Lusty, *Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials*, 24 SYDNEY L. REV. 361, 404 (2002).

[63] R v. Ngo (2003) 57 N.S.W.L.R. 55 at [13].

[64] *Id.* at [58].

[65] *Id.* at [60].

> sumption that there was no basis to challenge their credibility.[66]

The NSW Court of Criminal Appeal dismissed the appeal and found that the trial judge was entitled to conclude that the witnesses had genuine fears for their own safety and that of their family which would "prevent or impede them from giving adequate evidence in court."[67] Further, they "would probably not give evidence if required to do so face to face with the appellant in the courtroom."[68] However, the decision considers the general right of confrontation but does not consider specifically whether the accused's right to confrontation is infringed in the circumstances of the case.

The right to confrontation was considered by the NSW Court of Criminal Appeal in *BUSB v R*, where ASIO witnesses sought to give evidence under pseudonym, in closed court, and in a way that they could not be seen by the accused.[69] The accused argued that the screening order prevented "full and effective cross-examination."[70] The appellate court found that the trial judge exercised his discretion correctly in granting the screening order by considering the risk to national security if the accused viewed the witnesses' faces and the impact of the orders on the accused's fair trial.[71] The court considered that the inability to see the ASIO witnesses for the purpose of cross examination was not significant.[72] The right to a fair trial was not impinged by the law enforcement officers giving evidence anonymously as their evidence was "corroborative rather than critical evidence"[73] and each case will vary depending on its circumstances.[74] Further, the test of necessity was met because if the order were not made there would be a risk to ASIO officers and to national security.[75] Significantly, the court did not consider the power to make anonymity orders as the accused conceded that the court had the power to make such orders.[76]

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[66] *Id.* at [69].

[67] *Id.* at [106].

[68] *Id.*

[69] BUSB v R (2011) N.S.W.C.C.A. 39. The accused was on trial for shooting a police officer and firearm offenses. *Id.* at [6].

[70] *Id.* at [37].

[71] *Id.* at [55]-[86].

[72] *Id.* at [81].

[73] *Id.* at [82].

[74] *Id.* at [83].

The issue of whether a court has the power to make anonymity orders has been the subject of two differing approaches in two other Australian states—Queensland and Victoria. In a Queensland decision, the Queensland Court of Appeal held that undercover police officers could not give evidence under pseudonym.[77] It held that there was no common law principle to permit the use of pseudonyms and "it was a basic right of an accused person to know the true identity of his accuser."[78] However, in Victoria, its appeal court held that evidence from two undercover police officers could be given anonymously based on the extension of the principles of public interest immunity as undercover officers were analogous to informers. Justice Brooking, who wrote the lead judgment in the Victorian decision, held that "a claim for immunity should not be confined to undercover police operatives and that it extends to other witnesses whose personal safety may be endangered by the disclosure of their identity."[79] The correctness of Brooking J's reasoning has been doubted due to the fact that the informer rule has only protected the anonymity of non-testifying informers.[80]

Most jurisdictions in Australia have now passed legislation to enable law enforcement officers to give evidence anonymously.[81] The main types of witnesses who fall within this category are undercover or surveillance law enforcement officers.[82] However, there is no specific legislation, like the English legislation, to deal with witnesses who wish to give evidence anonymously, especially in circumstances where they are fearful or intimidated.[83]

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[75] *Id.* at [17], [86].

[76] *Id.* at [41].

[77] R v. Stipendiary Magistrate at Southport *ex parte* Gibson (1993) 2 Qd. R. 687.

[78] *Id.* at 692 (Williams, J.).

[79] Jarvie v. Magistrates' Court of Victoria (1995) 1 V.R. 84, 99, (Brooking, J.).

[80] Lusty, *supra* note 62, at 406.

[81] *See, e.g.,* Law Enforcement and National Security (Assumed Identities) Act, 1998 (N.S.W); Crimes Act, § 15YV (1914) (Cth.).

[82] To the author's knowledge, these provisions have not been tested by the courts.

This issue has not been resolved by Australian courts in relation to making orders for anonymity of witnesses whose personal safety is threatened—but are not part of a witness protection program or are not a police operative. Another issue to be tested by the High Court of Australia is the power to make such orders and the extent to which the use of anonymous witnesses offends the accused's right to a fair trial.

2.4 Anonymous witnesses in terrorism trials

Anonymous witnesses were used in the trial of Faheem Lodhi who was the first person to be convicted of committing an act in preparation of a terrorist offense.[84] Lodhi was charged with: collecting certain documents which were connected with preparation for a terrorist act, and knowing that connection; doing a certain act in preparation for a terrorist act; possessing a certain thing connected with preparation for a terrorist act, and knowing that connection. The documents in the first charge were maps of the Australian electricity supply grid. The act in the second charge was seeking information from a chemical supply company about the availability of materials capable of being used to make explosives or incendiary devices. The thing in the third charge was a document setting out the ingredients for and the method of making poisons, explosives, detonators, incendiary devices, etcetera.[85]

The trial judge made orders that the court be closed at certain times. Such orders were granted under legislation, which gave the court the power to close the court if "[it was] satisfied that it is in the interest of the security or defence of the Commonwealth."[86] The judge also made orders that the ASIO officers give evidence under pseudonym.[87] Further, the ASIO officers were screened off from the accused.[88] The defense only appealed against the order for closing the court based on the cumulative effect of a number of closed court orders having the effect of influencing the jury to such an extent that there would be a risk of unfair prejudice.[89] The appeal was rejected.[90] It is noted that witness anonymity did not appear to be objected to.

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[83] Of course, there are witness protection programs; however they have obvious limitations.

[84] R v. Lodhi (2006) 65 N.S.W.L.R. 573 at [2].

[85] The charges were laid under sections 101.5, 101.6, and 101.4 respectively of the Commonwealth Criminal Code 1995. R v. Lodhi (2006) 65 N.S.W.L.R. 573 at [2].

The second example of an anonymous witness in a terrorism trial is a Victorian case.[91] In a joint trial of twelve accused for various terrorist offenses, an undercover police officer who it was said infiltrated the terrorist organization to which, on the prosecution case, all of the accused belonged, gave evidence anonymously.[92] The undercover officer was identified by number, and the court ordered that he give his evidence via video link.[93] The court also ordered that the video image of his face be pixilated.[94] The trial judge applied *Jarvie v. Magistrates' Court of Victoria* to find that it was in the public interest that the undercover officer give his evidence anonymously.[95] It is interesting that the trial judge referred to the importance of the confrontation principle and the rule of law.[96] But, the judge did not consider at all the impact of the lack of confrontation on the fairness of the trial. This may be due to the fact that all defense counsel did not object to the orders, except they preferred that the jury see the officer's face. The potential prejudice that could be caused to the defendants by the officer being at a remote location—faceless and nameless—is due to the inability of the defence to effectively cross-examine. Cross examination could be disadvantaged by the inability to see the witness or to know any background facts about the witness. Further, it is not clear whether the judge confirmed—or was required to do so—that there were no convictions or adverse comments about the officer's credibility. As it happened, in this trial, the video equipment malfunctioned and did not create a pixilated image therefore the officer's evidence was taken by audio only.[97]

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[86] Criminal Code Act § 93.2 (1995); *see also* Crimes Act § 85B (1914) (Cth.) (allowing the court to close the court if "satisfied that such a course is expedient in the interest of the defence of the Commonwealth.").

[87] R v. Lodhi (2006) 65 N.S.W.L.R. 573 at [4].

[88] *Id.* at [4]. The ASIO officers gave evidence via video link. Everyone in the court room had access to a screen. However, the accused's screen was blank (the jury were not aware of this fact).

[89] *Id.* at [17].

[90] *Id.*

[91] R v. Benbrika (Ruling 23) (2008) V.S.C. 137.

[92] *Id.* at [1].

[93] *Id.* at [9].

[94] *Id.* at [10].

[95] *Id.* at [12].

[96] *Id.* at [12-13].

2.5 Comparison with European positions

In the English case of *R v. Davis*, the House of Lords overturned Davis' conviction due to him having an unfair trial in circumstances where his conviction was based on evidence from anonymous witnesses who were also the sole and decisive evidence of his guilt.[98] The English Parliament responded to this case with legislation that now provides that anonymous witnesses can be called if three conditions are met. First, the order is necessary to protect the witness, prevent serious damage to property, or real harm to the public interest.[99] Secondly, the provisions of the order are consistent with the defendant receiving a fair trial.[100] Finally, it is important in the interests of justice that the witness testifies and that the witness would not testify if the order was not made or there would be real harm to the public interest if the witness testified without one.[101]

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[97] *Id.* at [18-19].

[98] [2008] UKHL 36. Davis was convicted of the murder of two men at a New Year's Eve party. There were three witnesses who positively identified Davis as the murderer, but they claimed to be in fear of their lives from Davis. In order to ensure the witnesses' safety and to make sure they testified, the judge ordered that the witnesses give evidence under a pseudonym; any identifying particulars were to be withheld from Davis and his lawyers; Davis' counsel was not allowed to ask any question that might enable the witnesses to be identified; the witnesses were to give evidence behind screens (to be seen by judge and jury but not by Davis); and, the witnesses' natural voices were to be heard only by the judge and jury (Davis and his counsel were to hear them through mechanical distortion). *Id.* at [3].

[99] Coroners and Justice Act, 2009, part 3, c.2 § 88(3), 2009 (Eng.).

[100] *Id.* at § 88(4).

The jurisprudence of the European Court of Human Rights has developed three safeguards to admit anonymous testimony. First, the anonymous testimony should only be received if it is "strictly necessary."[102] Second, it should not form the "sole or decisive" basis for any conviction.[103] Third, there must be sufficient counter-balancing measures in place.[104]

The English position does not protect the accused's rights as far as the Strasbourg jurisprudence. However, both these positions are in sharp contrast to the lack of any safeguards or preliminary conditions regarding the admissibility of anonymous testimony in Australian courts. This issue is ripe for development in Australian law.

PART 3: SECRET INFORMATION

The Australian Federal Government enacted the National Security Information (Criminal and Civil) Proceeding Act 2004. The object of this Act is to prevent disclosure of information in federal criminal proceedings and civil proceedings "where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice."[105] Prior to this legislation, non-disclosure of information due to reasons of national security was dealt with by the doctrine of public interest immunity.[106]

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[101] *Id.* at § 88(5).

[102] Van Mechelen v. Netherlands (1998) 25 E.H.R.R. 647 at [47].

[103] Al-Khawaja v. United Kingdom (2009) 49 E.H.R.R. 1 at [H1]. This decision has been appealed to the Grand Chamber of the European Court of Human Rights and was argued in May 2010. At the time of writing, the judgment of the Grand Chamber has not been delivered.

[104] *See* Kostovski v. Netherlands (1989) 12 E.H.R.R. 434; Doorson v. Netherlands (1996) 22 E.H.R.R. 330; Van Mechelen v. Netherlands (1998) 25 E.H.R.R. 647; Al-Khawaja v. United Kingdom (2009) 49 E.H.R.R. 1.

[105] National Security Information (Criminal and Civil) Proceeding Act § 3 (2004) (Cth.) *available at* http://www.austlii.edu.au/au/legis/cth/consol_act/nsiacpa2004575/.

[106] See Part 2.2 of this article for an explanation of this doctrine. The law of public interest immunity is codified in section 130 of Australia's uniform evidence legislation. *See* Evidence Act, 1995 (Cth.); Evidence Act 1995 (N.S.W.); Evidence Act, 2001 (Tas.); Evidence Act, 2004 (N.I.); and Evidence Act, 2008 (Vic.).

Now the legislation sets out a complicated procedure for dealing with the disclosure of information which may harm national security. The first step in criminal proceedings is that a defendant or prosecutor must notify the Federal Attorney General if they know or believe that they or a witness will disclose information that relates to national security or may affect national security.[107] The Attorney General can then issue a certificate which is conclusive evidence that disclosure of the information is likely to prejudice national security.[108] The judge then determines in a closed hearing whether the information is to be disclosed. The defendant can be prevented from attending this hearing.[109] Further, the Attorney General may require that the defendant's lawyer be ordered to leave the court if they do not have security clearance at the required level.[110]

In the closed hearing, the judge will consider the risk of prejudice to national security if disclosure is allowed and whether non-disclosure would "have a substantial adverse effect on the defendant's right to receive a fair hearing."[111] The judge must give "greatest weight" to the risk of prejudice to national security.[112] A judge can allow or prevent disclosure of the information, permit disclosure in the form of a redacted copy or summary as suggested by the Attorney General, or as ordered by the court.[113]

It could be argued that the judge's discretion in determining disclosure is ineffective as a judge will view the Attorney General's certificate as conclusive evidence of the risk to national security. However, this argument has been judicially rejected.[114] The legislation has been comprehensively criticized by Justice Whealy, who heard two major Australian terrorism trials. Justice Whealy critiques the statutory regime as it affects the "efficient running of a criminal trial"; imposes "highly unusual obligations" on lawyers and court staff as they must obtain national security clearances; exposes lawyers to imprisonment of up to two years if they fail to notify the Attorney General of information that may affect national security; and, finally, is the cause of "delay and disturbance to the trial process [which] is perhaps the most significant potential problem created by the legislation."[115]

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[107] National Security Information (Criminal and Civil) Proceeding Act § 24-25 (2004) (Cth.).

[108] *Id.* § 26-28.

[109] *Id.* § 29(3).

[110] *Id.*

[111] *Id.* § 31(7).

[112] *Id.* § 31(8).

[113] *Id.* § 31.

[114] R v. Lodhi, N.S.W.S.C. Feb. 7, 2006 (Whealy, J.) (unreported), *appeal dismissed*, Lodhi v. R (2007) 179 A. Crim. R. 470.

Another issue raised by Justice Whealy is that special counsel has not been appointed within the confines of the National Security legislation, and it may be a "useful weapon in the armoury of a trial judge in a situation where there is a clash between national security claim and a suggestion that the defence will be substantially prejudiced or interfered with in the conduct of the case."[116]

In the two large terrorism trials in Australia, claims by the government under the secrecy legislation were upheld. It is noted that the defense was compromised in not being able to argue how the disclosure of the information could assist their case (as in all public interest immunity claims); however, the danger with this particular statutory regime is that suppression of information is given greater weight than the accused's right to a fair trial. At this point in time, there has been no appointment of special counsel in these types of applications.[117]

PART 4: SECRET EVIDENCE

Secret evidence is routinely used in applications to close Australian courts or suppress evidence. Secret evidence is also used to claim public interest immunity. The secret evidence is usually a confidential statement that is viewed only by the judge and the party seeking the orders. The orders are sought in either a closed or open court. The use of secret evidence in these types of applications does not directly impact a person's liberty; however, the non-disclosure of information to the accused could impact their defense.

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[115] Whealy, *supra* note 16, at 748.

[116] *Id.* at 750.

[117] Special counsel are used in public interest immunity claims in the United Kingdom and Canada. The special counsel represent the interests of the accused but do not disclose to the accused the secret information that is the subject of the public interest immunity claim or the evidence to support the claim being made.

Perhaps the most disturbing of the amendments after September 11 are the powers of the Australian Government to make control orders with the use of evidence which is only viewed by the government and the court. An Australian federal court may make control orders which restrict the movements of the person subjected to the order. A control order is made if the court is satisfied either that making the order would substantially assist in preventing a terrorist act or the person subject to the order has provided training to or received training from a terrorist organization. Proof is on the balance of probabilities.[118] Such applications can be made on an ex parte basis and supported by evidence which is not disclosed to the affected person or their lawyer.[119] This is problematic as the evidence is untested and not answered by the person who is subjected to the control order. The only document that the subject receives is the actual order which restricts their liberty.

Preventative detention can be made for up to fourteen days.[120] Preventative detention is initially made by the Australian Federal Police and is continued by issuing authorities. It aims to detain a person to prevent the commission of a terrorist act expected to occur within the next fourteen days or preserve evidence of a terrorist act which has occurred within the last twenty-eight days. Preventative detention is administrative, whereas control orders are judicial. Preventative detention has non-disclosure requirements that are designed to ensure that the order is kept a secret, and an order can be based on untested secret information.

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[118] Control orders are dealt with in Australian Federal Criminal Code Act, 1995, Div. 104 (Cth.). Only two control orders have been issued (Joseph Thomas and David Hicks), but both orders have expired.

[119] This point was observed by Justice Kirby in *Thomas v. Mowbray*, (2007) 233 C.L.R. 307.

[120] Criminal Code Act, 1995, Div. 105 (Cth.). To date, a preventative detention order has not been issued.

CONCLUSION

This article's aim was to introduce three aspects of Australian procedure relevant to terrorism. These three procedural aspects have the potential to significantly constrain the core values of criminal process: openness, fairness, and the right of confrontation.

In respect of the first constraint, anonymous witnesses, Australian courts appear to allow anonymity based on public interest considerations. Such reasoning has been applied specifically to allow anonymity for an undercover intelligence officer in one terrorist trial.[121] The correctness of relying on the doctrine of public interest immunity to suppress identity and restrict the openness of the court has been the subject of criticism and is contrasted with the application of the common law in another Australian jurisdiction.[122] The use of anonymous witnesses based on public interest immunity grounds is a misapplication of the law. The correctness of this position requires appellate testing.[123] It is also noted that the use of anonymous witnesses in terrorism trials to date has received a level of acceptance without consideration of the overseas jurisprudence on confrontation. Further, the Australian examples demonstrate that the prosecution is able to rely on secret witnesses without the court scrutinizing the grounds for relying on anonymity.[124]

In the two terrorist trials discussed in this article, anonymous witnesses were received without objection from the defense. Both cases illustrate that the seriousness of the offense may be permitting an acceptance of secret witnesses without putting the government to proof for the need for secrecy. It appears that those representing the defense are simply accepting the government's claim for anonymity without making submissions about the impact on fairness due to the lack of confrontation. The acceptance of this method for adducing evidence is a cause for concern, especially in circumstances where the court does not consider any of the matters that are contained in the English legislation and the Strasburg jurisprudence. In addition, it appears that the defense is not provided with information that may impact the credibility of the secret witness. At a minimum, the prosecution or law enforcement agency should provide certification of the anonymous witness' prior convictions or other matters that could affect their credibility. The urgent need for Australia's adoption of a human rights act becomes clear when examining the development of the law about anonymous witnesses in other common law jurisdictions. This is because the law relating to the use of secret witnesses has been developed in other common law jurisdictions by reference to their legislated right of confrontation contained in a bill of rights.

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[121] R v. Benbrika (Ruling 23) (2008) V.S.C. 137.

[122] Lusty, *supra* note 62, 406-08; *see also* R v. Stipendiary Magistrate at Southport *ex parte* Gibson (1993) 2 Qd. R. 687 (the Queensland decision that rejected this approach).

[123] As discussed, in *BUSB v. R*, (2011) N.S.W.C.C.A. 39, the appellant accepted that the court had the power to make orders to protect the anonymity of the witness and therefore the NSW appeal court did not consider the conflicting Australian authorities on this issue.

[124] For example, see the requirements placed on the use of anonymous witnesses in the English legislation at Part 2.5 of this article.

The non-disclosure of information based on the likely harm to national security is not a new criminal procedure. However, Australia's position is very novel as it legislates that the harm to national security is to be given greater weighting than the rights of the accused. This has the potential to create unfairness. In addition, the disruptions placed on the trial caused by applications under the legislation, together with the extra burdens placed on the lawyers in the proceedings, do not justify the government's codification and modification of the doctrine of public interest immunity. Finally, Australia's use of secret evidence to obtain control and preventative detention orders is the most alarming part of Australia's legislative regime in response to terrorism. The use of secret evidence to restrict citizens' rights represents the greatest infringement of the fundamental rights of open justice, fairness, and confrontation.

MILITANT SPEECH ABOUT TERRORISM IN A SMART MILITANT DEMOCRACY

Clive Walker[*]

INTRODUCTION

One strong and persistent strand of analysis of the experiences of political extremism in the 1930s is that there were hard lessons to be drawn by liberal democracies. Those lessons were spelt out by some notable contemporary commentators, such as Karl Lowenstein, who warned forcefully, but largely in vain, about the need for democracies to become "militant" and to avoid "legalistic self-complacency and suicidal lethargy."[1] This discourse was reinforced in the immediate post-war era by the likes of Clinton Rossiter,[2] who was even prepared to countenance "constitutional dictatorship," with extensive emergency regulation powers in the hands of the executive, in order to defend against the renewed forms of totalitarianism which then assailed free societies.

These messages became more muted as time passed. But there has been a strong revival of the concept of "militant democracy" after the events of September 11, 2001 with several important academic commentaries appearing under that title.[3] Indeed, in its current guise, the concept of militant democracy arguably suffers from the opposite failing to that encountered in Lowenstein's time. Rather than failing to heed the call, there are now warriors for militant democracy whose prescriptions appear more dramatic and dangerous than the threat of terrorism which they seek to address. Into this category may be placed the contemplators of torture,[4] as well as theorists[5] who are willing to overturn all constitutional niceties on a scale, on a hope, and a prayer of constitutional restitution, rather like the Reichspräsident's approval of the Reichstag Fire Decree of February 28, 1933.[6] Even more extreme expressions of militancy are Agamben's "zone of anomie in which all legal determinations . . . are deactivated"[7] and theories of "enemy criminal law" posited by Jakobs.[8] These successors to Carl Schmitt[9] seek to propagate notions that inevitably dehumanize and delegitimize state action.

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[*] Professor of Criminal Justice Studies, School of Law, University of Leeds, Leeds LS2 9JT, UK, law6cw@leeds.ac.uk. The author thanks Professors Sylvie Cimamonti and Russ Weaver for the invitation to attend the Criminal Procedure Discussion Forum at the University of Aix-Marseille III on June 10-11, 2010. Work on the paper was supported by the Arts & Humanities Research Council [fellowship grant no AH/G00711x/1].

[1] Karl Lowenstein, *Militant Democracy and Fundamental Rights*, 31 AM. POL. SCI. REV. 417, 431-32 (1937).

[2] *See* CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP 38-39, 53, 60-62 (1948); *see also* JOHN EAVES, JR., EMERGENCY POWERS AND THE PARLIAMENTARY WATCHDOG: PARLIAMENT AND THE EXECUTIVE IN GREAT BRITAIN, 1939-51 (1957); Eugene A. Gilmore, *War Power—Executive Power and the Constitution*, 29 IOWA L. REV. 463 (1944); W. Ivor Jennings, *The Rule of Law in Total War*, 50 YALE L.J. 365 (1941); Arthur Berriedale Keith, *The War and the Constitution*, 4 MOD. L. REV. 1, 82 (1940); Bernard Schwartz, *The War Power in Britain and America*, 20 N.Y.U. L. REV. 325 (1945).

Of course, "militant democracy" is a political construct rather than a legal term of art. As such, it can easily be manipulated for good or bad in its meanings and purposes. It is not claimed here that it bears an essential meaning, but the meaning adopted in this paper involves the endorsement that the state has a right and a duty to take action against significant forms of terrorism, such as the nationalist and highly organized terrorism of the likes of the Irish Republican Army or the

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[3] *E.g.*, MILITANT DEMOCRACY (András Sajó ed., 2004); THE 'MILITANT DEMOCRACY' PRINCIPLE IN MODERN DEMOCRACIES (Markus Thiel ed., 2009); John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210 (2004).

[4] *See, e.g.*, ALAN M. DERSHOWITZ, WHY TERRORISM WORKS (2002); Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481 (2004).

[5] *E.g.*, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004).

[6] *See* INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH 46-47 (Harvard Univ. Press 1991) (1987).

[7] GIORGIO AGAMBEN, STATE OF EXCEPTION 50 (Kevin Attell trans., Univ. of Chi. Press 2005) (2003).

[8] GUNTHER JAKOBS, DERECHO PENAL DEL ENEMIGO (2d ed. 2006).

[9] CARL SCHMITT, POLITICAL THEOLOGY (George Schwab trans., Univ. of Chi. Press 2005) (1922); *see* DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY (2006).

"new" terrorism[10] propagated by more transnational and loosely based groupings, epitomized by Al-Qa'ida. In that sense, the state should indeed be "militant." At the same time, state action must recognize that these forms of terrorism are endemic reactions to modernity and late modernity. Thus, contrary to the promise of the concept, the "war on terror,"[11] terrorism is not going to be wholly vanquished in this decade, in this generation, or probably in the next century, just as it did not vanish in the past decade, generation, or century. From this insight flows a reminder to the state that its purpose is the maintenance and triumph of its own values, such as democracy, individual rights, and the rule of law.[12] The "smart militant state" must therefore work out its own forms of militant reaction that become more or less permanent and must therefore adopt policies that can be accommodated within fundamental values rather than displacing them even during a temporary period of "emergency."

The United Kingdom is not the smartest of "smart militant states." There are many dark pages within its manual of militancy. They include the application of measures bordering on torture as applied to selected Irish terror suspects in 1971.[13] Even the attempt to enjoin these techniques of "deep interrogation" were apparently forgotten by the British Army by the time of the invasion of Iraq in 2004, with shameful reminders of the dire consequences now played out in the Aitken Report[14] and the Baha Mousa inquiry.[15] Collusion with contras is not just exclusive to U.S. involvement in Nicaragua[16] but also has its counterpart in collusion with paramilitaries in Northern Ireland,[17] now augmented by allegations of collusion with disreputable foreign regimes.[18] The unnecessary or excessive use of lethal force has also formed a recurrent thread, from Bloody Sunday 1972[19] to the shootings of the Gibraltar Three in 1988[20] and Jean de Menezes in 2005.[21] The foregoing are perhaps the most egregious abuses, involving the most fundamental rights to life and freedom from torture, inhuman and degrading treatment. However, there are numerous other excessive and persistent state incursions into rights to life, liberty, privacy, and expression that could be recounted.

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[10] *See* BRYNJAR LIA, GLOBALISATION AND THE FUTURE OF TERRORISM: PATTERNS AND PREDICTIONS (2005); PETER R. NEUMANN, OLD AND NEW TERRORISM (2009).

[11] *See* President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html.

[12] *See generally* CLIVE WALKER, TERRORISM AND THE LAW ch. 1 (2011) (providing further elaboration).

[13] Ireland v. United Kingdom, App. No. 5310/71, Ser. A 25, 2 E.H.R.R. 25 (1978).

[14] MINISTRY OF DEFENSE, THE AITKEN REPORT: AN INVESTIGATION INTO CASES OF DELIBERATE ABUSE AND UNLAWFUL KILLING IN IRAQ IN 2003 AND 2004 (2008).

[15] *News From the Inquiry*, BAHA MOUSA PUBLIC INQUIRY, http://www.bahamousainquiry.org/ (last visited Feb. 10, 2011).

[16] Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

This negative record notwithstanding, the label, "smart militant state," can at a stretch be fairly assigned to the United Kingdom state. Few would deny the label "militant." The United Kingdom can assuredly claim to have encountered more configurations and episodes of revolutionary terrorism than most other polities, and it has not been slow to devise special laws to deal with the situation.[22] Experience has derived from the bygone era of British Empire, from the intermittent, irredentist campaigns of terrorism in Ireland against colonization and then incorporation within the British state over a period of more than three centuries, and now the advent in Britain of Al-Qa'ida has generated further legislation, which especially seeks to avert its threat of mass casualties on an anticipatory and precautionary basis.[23]

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[17] *See* SIR JOHN STEVENS, METRO. POLICE SERV., STEVENS ENQUIRY 3: OVERVIEW & RECOMMENDATIONS (2003); HOUSE OF COMMONS, CORY COLLUSION INQUIRY REPORT: PATRICK FINUCANE, 2004, H.C. 470 (U.K.); HOUSE OF COMMONS, CORY COLLUSION INQUIRY REPORT: ROBERT HAMILL, 2004, H.C. 471 (U.K.); HOUSE OF COMMONS, CORY COLLUSION INQUIRY REPORT: BILLY WRIGHT, 2004, H.C. 472 (U.K.); HOUSE OF COMMONS, CORY COLLUSION INQUIRY REPORT: ROSEMARY NELSON, 2004, H.C. 473 (U.K.); Bill Rolston, '*An Effective Mask for Terror': Democracy, Death Squads and Northern Ireland*, 44 CRIM. L. & SOC. CHANGE 181 (2005); POLICE OMBUDSMAN FOR NORTHERN IRELAND, STATEMENT BY THE POLICE OMBUDSMAN FOR NORTHERN IRELAND ON HER INVESTIGATION INTO THE CIRCUMSTANCES SURROUNDING THE DEATH OF RAYMOND MCCORD JUNIOR AND RELATED MATTERS (2007).

[18] R (Mohamed) v. Sec'y of State for the Foreign & Commonwealth Affairs (No. 1), [2008] EWHC (Admin) 2048, [2009] 1 W.L.R. 2579 (Eng.); R (Mohamed) v. Sec'y of State for the Foreign & Commonwealth Affairs (No. 2), [2009] EWHC (Admin) 152, [2009] 1 W.L.R. 2653 (Eng.); R (Mohamed) v. Sec'y of State for the Foreign & Commonwealth Affairs (No. 2), [2010] EWCA (Civ) 65, [2010] 3 W.L.R. 554 (Eng.); *see* JOINT COMMITTEE ON HUMAN RIGHTS, ALLEGATIONS OF UK COMPLICITY IN TORTURE, 2008-09, H.L. 152, H.C. 230 (U.K.); HOME DEPARTMENT, THE GOVERNMENT REPLY TO THE TWENTY-THIRD REPORT FROM THE JOINT COMMITTEE ON HUMAN RIGHTS, 2009, Cm. 7714 (U.K.).

[19] *See* LORD SAVILLE OF NEWDIGATE, WILLIAM HOYT & JOHN TOOHEY, HOUSE OF COMMONS, REPORT OF THE BLOODY SUNDAY INQUIRY, 2010, H.C. 29-I (U.K.).

[20] *See* McCann v. United Kingdom, App. No. 18984/91, Ser. A 324, 21 E.H.R.R. 97 (1996).

[21] *See* INDEP. POLICE COMPLAINTS COMM'N, STOCKWELL ONE: INVESTIGATION INTO THE SHOOTING OF JEAN CHARLES DE MENEZES AT STOCKWELL UNDERGROUND STATION ON 22 JULY 2005 (2007); INDEP. POLICE COMPLAINTS COMM'N, STOCKWELL TWO: AN INVESTIGATION INTO COMPLAINTS ABOUT THE METROPOLITAN POLICE SERVICE'S HANDLING OF PUBLIC STATEMENTS FOLLOWING THE SHOOTING OF JEAN CHARLES DE MENEZES ON 22 JULY 2005 (2007).

Whether the current U.K. anti-terrorism laws can equally be designated as "smart," in the sense of appreciating the need for prolonged and broad policies that maintain legitimacy, remains a matter of fierce debate. Many express disquiet, including the newly elected government which has promised to introduce further safeguards against abuse.[24] Yet, there may be three features that can be claimed to be redolent of "smart" militancy, even if none is entirely convincing.

First, there is recognition of permanence. In the current U.K. anti-terrorism legislation, only the measures relating to twenty-eight day pre-charge police detention,[25] and control orders,[26] and non-jury "Diplock" courts[27] are subject to any form of sunset clause. In fact, the sun need never set, since all these measures are endlessly renewable for further periods of years. For instance, the "Diplock" courts have persisted in one form or another since 1973.[28] However, this permanence has imparted a sense that the measures must be sustainable in terms of the narratives of legitimacy on which the United Kingdom state relies. The result has been a move away from measures that are labeled "Temporary Provisions" and that expressly derogate from rights. In this way, there occurred a very important transition when the Terrorism Act 2000 replaced the Prevention of Terrorism (Temporary Provisions) Act 1989 and Northern Ireland (Emergency Provisions) Act 1996, its very name signaling a claim to sustainability. In addition, the derogation under article 15 of the European Convention on Human Rights, which had existed in Northern Ireland since ratification in 1954 (with a break of four years between 1984 and 1988),[29] was removed in February 2001. It therefore represented a considerable reversal when a new derogation notice was lodged in December 2001 so as to permit detention without trial of foreign terror suspects under the Anti Terrorism, Crime and Security Act 2001. But that policy was reversed in March 2005,[30] when detention without trial was terminated following an adverse court decision on the compatibility of detention without trial with human rights requirements. Moreover, throughout the period since September 11, there has been a marked divergence from the rhetoric of the "war on terror," as one would expect if policies are to be sustained and legitimate. British dalliance with a "war model" has been confined to military operations in Afghanistan and Iraq where the term "counter-insurgency" is the preferred label for the foreign aspects of policy.[31] Even in this sphere, the operative rules have remained the regular international humanitarian and human rights laws. In this way, there has emerged no British "legal black hole"[32] equivalent to the regime at Guantánamo Bay.[33] Nor has there been any overt emulation of U.S. programs of executive domestic surveillance[34] or rendition for interrogation.[35] Instead the U.K. government has rejected even the terminology of the "war on terror" and claims instead that "prosecution is—first, second, and third—the government's preferred approach when dealing with suspected terrorists."[36] As the former Foreign Secretary, David Miliband, has declared, "[D]emocracies must respond to terrorism by championing the rule of law, not subordinating it, for it is the cornerstone of the democratic society."[37] There is much room for dismay about the outcomes of the current legislation, but the disposition to constitutionalism at least makes a claim that the current legislation is "not a mask but the true image of our nation"[38] and offers real protection from naked state power.[39]

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[22] *See* CLIVE WALKER, THE PREVENTION OF TERRORISM IN BRITISH LAW ch. 4 (1992); WALKER, *supra* note 12, at ch. 1.

[23] *See* Clive Walker, *Terrorism and Criminal Justice: Past, Present and Future*, 2004 CRIM. L. REV. 311 (2004).

[24] CABINET OFFICE, THE COALITION: OUR PROGRAMME FOR GOVERNMENT (2010); *see also* JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS (SEVENTEENTH REPORT): BRINGING HUMAN RIGHTS BACK IN, 2010, H.L. Paper 86, H.C. 111 (U.K.).

[25] Terrorism Act 2006, c. 11, § 23 (U.K.).

[26] Prevention of Terrorism Act, 2005, c. 2, § 6 (U.K.).

[27] *See* SECRETARY OF STATE FOR NORTHERN IRELAND, REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, Cm. 5185.

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[28] *See* Justice and Security (Northern Ireland) Act, 2007, c. 6, § 1 (U.K.).

[29] *See* Brogan v. United Kingdom, 11 Eur. Ct. H.R. 117 (1989); Brannigan & McBride v. United Kingdom, App. Nos. 14553/89, 14554/89, Ser. A 258-B, 17 E.H.R.R. 539 (1994); Council of Europe, Convention for the Protection of Human Rights & Fundamental Freedoms, List of Declarations Made with Respect to Treaty No. 005, http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CV=0&NA=&PO=999&CN=999&VL=1&CM=9&CL=ENG (last visited Feb. 10, 2011).

[30] A v. Sec'y of State for the Home Dept., [2004] UKHL 56, [2005] A.C. 68 (appeal taken from Eng.); *see* Brice Dickson, *Law Versus Terrorism: Can Law Win?*, 2005 EUR. HUM. RTS. L. REV. 11; David Feldman, *Proportionality and Discrimination in Anti-Terrorism Legislation*, 64 CAMBRIDGE L.J. 271 (2005); Clive Walker, *Prisoners of "War All the Time"*, 2005 EUR. HUM. RTS. L. REV. 50. The House of Lords decision was largely confirmed by the European Court of Human Rights in *A v. United Kingdom*, App. No. 3455/05, 49 E.H.R.R. 29 (2009).

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[31] *See* CABINET OFFICE, THE NATIONAL SECURITY STRATEGY OF THE UNITED KINGDOM: UPDATE 2009 – SECURITY FOR THE NEXT GENERATION, 2009, Cm. 7590, at 81.

[32] Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1 (2004); *see also* R (Al-Skeini) v. Sec'y of State for Defence [2007] UKHL 26, [2008] 1 A.C. 153 (appeal taken from Eng.).

[33] Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001).

[34] U.S. DEPT. OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006). But regular United Kingdom statutory powers are already very broad. *See* Liberty v. United Kingdom, App. No. 58243/00, 48 E.H.R.R. 1 (2009); Regulation of Investigatory Powers Act, 2000, c. 23, §§ 26-32 (U.K.).

[35] *See* INTELLIGENCE AND SECURITY COMMITTEE, RENDITION, 2007, Cm. 7171 (U.K.); PRIME MINISTER'S OFFICE, GOVERNMENT RESPONSE TO THE INTELLIGENCE AND SECURITY'S REPORT ON RENDITION, 2007, Cm. 7172 (U.K.); ALL PARTY PARLIAMENTARY GROUP ON EXTRAORDINARY RENDITION, EXTRAORDINARY RENDITION: CLOSING THE GAP – A PROPOSAL TO CRIMINALISE UK INVOLVEMENT (2009), *available at* www.extraordinaryrendition.org; Clive Walker, *The Treatment of Foreign Terror Suspects*, 70 MOD. L. REV. 427 (2007).

[36] 472 PARL. DEB., H.C. (6th ser.) (2008) 561.

[37] Julian Borger, *'War on Terror' Was a Mistake, Says Miliband*, GUARDIAN, Jan. 15, 2009, at A1.

A second feature of "smart" militancy is a growing acceptance of the need to accommodate rights.[40] There may be four aspects to this change, which has been very much encouraged by advent of the Human Rights Act 1998. The first is a framing perspective by which human rights rule in and rule out potential approaches to counter-terrorism—such as torture or rendition. At the same time, the suppression of terrorism can itself be founded on rights arguments (for example, about the right to life and democracy),[41] and special laws are certainly not debarred *per se*. The second perspective is rights-specific and relates to the interpretation of individual rights in a way that does not wholly prioritize national security interests in a way that was common pre-2000 with doctrines such as non-justiciability.[42] Activities that are seen as within the purview and expertise of courts—such as procedure—have been subjected to stricter standards than activities that rarely trouble the courts (such as surveillance). The third impact is temporal—that rights scrutiny gains traction as counter-terrorism campaigns mature. The fourth point is that the treatment of rights in counter-terrorism can have socially transformative impacts by affecting negatively or positively the mobilizing factors for or against terrorism. Thus, anti-terrorism laws may create suspect or supportive communities, and the tempering process encourages an ultimate resolution of the emergency by ruling out grievous breaches of international law and maintaining the recognition of common humanity.[43]

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[38] MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR 144 (Edinburgh Univ. Press 2005) (2004).

[39] *See* BARRY VAUGHAN & SHANE KILCOMMINS, TERRORISM, RIGHTS AND THE RULE OF LAW: NEGOTIATING JUSTICE IN IRELAND 13 (2008); Colm Campbell & Ita Connolly, *Making War on Terror? Global Lessons from Northern Ireland*, 69 MOD. L. REV. 935, 939 (2006); Susan Marks, *State-Centrism, International Law, and the Anxieties of Influence*, 19 LEIDEN J. INT'L L. 339 (2006).

[40] *See* Clive Walker, *The Threat of Terrorism and the Fate of Control Orders*, 2010 PUB. L. 4 (2010).

[41] *See* Klass v. Germany, App. No. 5029/71, Ser. A 28, 2 E.H.R.R. 214, 232 (1978) ("Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats . . . .").

[42] *See* R v. Sec'y of State for the Home Department *ex parte* Adams, [1995] All E.R. (EC) 177; Adams & Benn v. United Kingdom, App. Nos. 28979/95, 30343/96, 23 E.H.R.R. CD160 (1997); Clive Walker, *Constitutional Governance and Special Powers Against Terrorism: Lessons from the United Kingdom's Prevention of Terrorism Acts*, 35 COLUM. J. TRANSNAT'L L. 1 (1997).

A third feature of "smart" militancy is the ability to conceive counter-terrorism approaches in broad terms and to avoid over-reaction to the latest event—the "politics of the last atrocity." Such a stance has now emerged with the publication of a clear, clever, and comprehensive counter-terrorism strategy ("CONTEST"), as issued in 2006 and revised in 2009.[44] Delivery of the strategy continues to be organized around four principal work streams as follows: (1) Pursue: to stop terrorist attacks; (2) Prevent: to stop people from becoming terrorists or supporting violent extremism; (3) Protect: to strengthen our protection against terrorist attack; (4) Prepare: where an attack cannot be stopped, to mitigate its impact. Traditional criminal justice effort is focused around "Pursuit." Out of these strands, "Prevent" has risen to the fore since the July 2005 bombings, which obliged the government and public to confront the unpalatable fact that the terrorism was not the work of alien foreigners but involved attacks by their erstwhile neighbors.[45] Therefore, efforts must be made to reduce this propensity, including efforts to nullify extreme narratives,[46] adding to the emphasis on anticipatory risk and pre-emption rather than aftermath response,[47] as well as a resort to intelligence rather than evidence.[48]

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[43] *See* Brice Dickson, *The House of Lords and the Northern Ireland Conflict – A Sequel*, 69 MOD. L. REV. 383 (2006).

[44] HOME DEPARTMENT, COUNTERING INTERNATIONAL TERRORISM: THE UNITED KINGDOM'S STRATEGY, 2006, Cm. 6888 (U.K.); HOME DEPARTMENT, PURSUE, PREVENT, PROTECT, PREPARE: THE UNITED KINGDOM'S STRATEGY FOR COUNTERING INTERNATIONAL TERRORISM, 2009, Cm. 7547, at 55 (U.K.); *see* Frank Gregory, *National Governance Structures to Manage the Response to Terrorist Threats and Attacks*, *in* HOMELAND SECURITY IN THE UK: FUTURE PREPAREDNESS FOR TERRORIST ATTACK SINCE 9/11, at 117 (Paul Wilkinson ed., 2007).

[45] *See* Clive Walker, '*Know Thine Enemy as Thyself*': *Discerning Friend from Foe under Anti-Terrorism Laws*, 32 MELB. U. L. REV. 275 (2008). The extent to which foreign influences continue remains unclear. *But see* ANDY HAYMAN & MARGARET GILMORE, THE TERRORIST HUNTERS: THE DEFINITIVE INSIDE STORY OF BRITAIN'S FIGHT AGAINST TERROR 286 (2009).

[46] *See* GILLES KEPEL, THE WAR FOR MUSLIM MINDS: ISLAM AND THE WEST (2004).

Having thus set the scene for action by a "smart militant democracy," it is intended in this paper to consider the performance by the United Kingdom state in the context of a classical dilemma facing militant democracies and one which greatly exercised polities in the 1930s.[49] That context is the appropriate response to militant speech—speech which in some ways encourages extremist political behavior and even violence but which is delivered in a mode that avoids participation in violence or even the traditional inchoate crimes of incitement or solicitation. This divorce between militant speech and militant action may arise either because of the equivocal nature of the words being spouted or because of the distance in time, place, or both between speaker and intended audience. The problem therefore is to be militant against terrorism in all its guises but to be smart enough to uphold the value of freedom of expression and to recognize that political platforms of secession or the revolutionary establishment of a workers' dictatorship or a Caliphate are all part of the rich tapestry of the marketplace of ideas. Unfortunately, there is no Manichean diving rod between the encouragement of terrorism and the encouragement of Millian good. There are plenty of reasons to doubt George W. Bush's glib aphorism, voiced on September 20, 2001, that "either you are with us, or you are with the terrorists."[50] Rather, the contemporary complexity is illustrated by the pronouncement in 1981 of Danny Morrison, a leader of Sinn Féin: "Who here really believes we can win the war through the ballot box? But will anyone here object if, with a ballot paper in one hand

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[47] *See* ALAN M. DERSHOWITZ, PREEMPTION: A KNIFE THAT CUTS BOTH WAYS (2006); RON SUSKIND, THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11 (2006).

[48] *See* Clive Walker, *Intelligence and Anti-Terrorism Legislation in the United Kingdom*, 44 CRIM. L. & SOC. CHANGE 387 (2005).

[49] Lowenstein also concentrated on this aspect and praised the Public Order Act 1936 as one appropriate response. Lowenstien, *supra* note 1, at 649, 652. Public Order Act, 1936, 8 & 1 Geo. 6, c. 6, §§ 2-5 (Eng., Wales, Scot.).

[50] Bush, *supra* note 11.

and the Armalite in the other, we take power in Ireland?"[51] Morrison recognized more than anyone that he was "walking on eggshells" when treading the path between legality and illegality. As the Director of Publicity for Sinn Féin, he paid the price with several years of imprisonment for his proximity to the IRA's punishment machinery.[52]

Just two responsive state measures of militancy will be selected for discussion in this paper. Both were enacted by the Terrorism Act 2006, and both relate to indirect incitement and glorification of terrorism. They both reflect the "Prevent" element of the CONTEST strategy by allowing for criminalization of speech at a much earlier stage than previous measures, the point being to suppress it and to shape discourse rather than to seek a multitude of prosecutions.

Because of this focus, a number of other measures against militant speech will not be considered, even though the United Kingdom state has a very long record of action against militant speech about terrorism, and the chronology certainly did not commence after September 11, 2001. Perhaps the most venerable tools of the trade are the offenses against the state, such as treason and sedition. A modicum of interest has been shown in the United States for these offenses. In 2006, a Federal grand jury issued an indictment for treason, charging Adam Yahiye Gadahn with involvement in Al-Qa'ida videos.[53] Seditious conspiracy was charged in the United States against Sheikh Omar Abdel Rahman arising from the 1993 World Trade Center attack and other plans.[54] However, there is virtually no corresponding interest in the United Kingdom. The offenses are seen as complex and obscure, and the death penalty for treason, its foremost lure in the eyes of many proponents, was removed by the Crime and Disorder Act 1998.[55] Likewise, offenses of sedition and seditious libel were abolished with virtually no public debate by the Coroners and Justice Act 2009.[56] The main approaches now comprise the proscription of organizations, which take part in violence under Part II of the Terrorism Act 2000 (explained further below): media restrictions, which became acute after 1988 in the form of a broadcasting ban on interviews with Sinn Féin representatives but which were lifted in 1994,[57] and restrictions on forms of political participation. These include, first, requiring declarations of non-violence as a condition of candidature, implemented by the Elected Authorities (Northern Ireland) Act 1989, sections 3 and 5.[58] Second, the candidature of prisoners in parliamentary elections, highlighted by election of Republican hunger-striker, Bobby Sands, in 1981 provoked furious state reaction.[59] The Representation of the People Act 1981 disqualifies from nomination for, and membership of, the House of Commons any person convicted of an offense and sentenced to more than twelve months' imprisonment either in the United Kingdom or in the Republic of Ireland.

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[51] Ian McAllister, '*The Armalite and the Ballot Box': Sinn Fein's Electoral Strategy in Northern Ireland*, 23 ELECTORAL STUD. 123, 124 (2004).

[52] His conviction for involvement in the IRA-false-imprisonment in 1990 of a suspected informant (Sandy Lynch) was later overturned because of the involvement of British informants, which the state had suppressed. R v. Morrison [2009] NICA 1 (Crim.) (N. Ir.).

[53] *See* Douglas A. Kash, *The United States v. Adam Gadahn: A Case for Treason*, 37 CAP. U. L. REV. 1 (2008).

[54] United States v. Rahman, 189 F.3d 88, 123-25 (2d Cir. 1999).

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[55] Crime and Disorder Act, 1998, c. 37, § 36 (U.K.) (abolishing the death penalty in the United Kingdom); Convention for the Protection of Human Rights and Fundamental Freedoms, States of the Council of Europe, Protocol 6, Art. 1-2, June 1, 2010 [hereinafter Convention], *available at* http://conventions.coe.int/treaty/en/treaties/html/005.htm.

[56] Coroners and Justice Act, 2009, c. 25, § 73 (U.K.) (abolishing sedition, seditious libel, defamatory libel, and obscene libel in England, Wales, and Northern Ireland).

[57] *See* Caroline Banwell, *The Courts' Treatment of the Broadcasting Bans in Britain and the Republic of Ireland*, 16 J. MEDIA L. & PRAC. 21 (1995); Gerard Hogan, *The Demise of the Irish Broadcasting Ban*, 1 EUR. PUB. L. 69 (1995). Challenges under article 10 to such restrictions were rejected at the time. *See* Brind & Others v. United Kingdom, App. Nos. 18714/91, 18759/91, 77-A DR 42, 18 E.H.R.R. CD76 (1994); McLaughlin v. United Kingdom, App. No. 18759/91, 77-A DR 42, 18 E.H.R.R. CD84 (1994); Purcell v. Ireland, App. No. 15404/89, 70 Eur. Comm'n H.R. Dec. & Rep. (1991); Hogefeld v. Germany, App. No. 35402/97 (2000), *available at* http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/. But the Court has since indicated that it will not accept bans based on affiliation alone. *See* Kanat and Bozan v. Turkey, App. No. 13799/04, 46 E.H.R.R. 14 (2008). And it has applied a more stringent test to prior restraints on the press. *See* Ürper v. Turkey, App. No. 14526/07 (2009); Ürper v. Turkey (No. 2), App. No. 55036/07 (2010), *available at* http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/; Turgay v. Turkey, App. No. 8306/08 (2010), *available at* http://www.echr.coe.int/ ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/.

[58] Election Authorities (Northern Ireland), 1989, c. 3, §§ 3, 5 (N. Ir.). *See* Clive Walker, *Political Violence and Democracy in Northern Ireland*, 51 MOD. L. REV. 605, 619 (1988).

[59] Clive Walker, *Prisoners in Parliament: Another View*, 1982 PUB. L. 389; John Finn, *Electorial Regimes and the Proscription of Anti-Democratic Parties*, 12 TERRORISM & POL. VIOLENCE 51, 72 (2000).

In summary, it is intended in this paper to explain and analyze the measures taken in 2006 against militant speech about terrorism in the U.K.'s special anti-terrorism laws. These sources comprise, first, the proscription of organizations that advocate and encourage terrorism, and secondly the prosecution of individuals who engage in such conduct. These two strands are selected as the most direct serious incursions into speech rights in connection with terrorism. Are these provisions "smart" enough to sit well within the armory of a "smart militant democracy"?

PROSCRIPTION ON GROUNDS OF ENCOURAGEMENT

Part II of the Terrorism Act 2000 responds not so much to militant expressions as to militant associations. It permits the proscription of selected organizations and, on the back of that device, then criminalizes membership and specified activities. These are time-honored devices—the IRA has been proscribed since 1918 and Al-Qa'ida since February 2001.[60] Nowadays, many more foreign-based *jihadi* groups are proscribed than Irish groups, though there is still a reluctance to extend the measure to Fascists and racists,[61] Welsh and Scottish extremists, or animal rights and environmental militants, since all lack sophistication and strength. In its paper on animal rights extremism, the Home Office expressed itself as not persuaded that proscription would assist[62] and recommended alternatives.[63]

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[60] For a pre-2000 history, see WALKER, *supra* note 22, at ch. 5. For a post-2000 history, see CLIVE WALKER, BLACKSTONE'S GUIDE TO THE ANTI-TERRORISM LEGISLATION ch. 1 (2009).

[61] HANSARD (H.C.) STANDING COMMITTEE D (25 Jan. 2000), David Maclean; 656 PARL. DEB., H.L. (5th ser.) (2004) 169, Lord Greaves.

In many ways, proscription of terrorist groups has become a British tradition, which is so much a fixture of the legal and political environment that it barely sparks any public debate or criticism. That lax stance is not endorsed here, but this traditional form of proscription is not the prime focus of this paper not only because it is not novel but, more pertinently, because it is relatively easy to justify in principle the curtailment of expressive and associational rights for those who wish to invoke them in order to destroy the lives and rights of others and, in the case of some groups, the very existence of a liberal democracy. Thus, the smart militant democracy's objectives of the protection of life and the preservation of democratic discourse unsullied by threats appear compelling. Challenges under European Convention standards will be answered either under Article 17,[64] or under the limitations to Articles 10 and 11.[65] Any association with violent methods will produce condemnation under one or both of these provisions, even if its ultimate policy goals are acceptable.[66] Conversely, those with peaceful ambitions to change constitutional foundations should not be debarred.[67] But if the proposed new constitutional model is inherently inimical to the rights of others, then restrictions can again bite. Thus, the banning of bodies that seek to impose *Sharia* law has been sustained on the basis that *Sharia* law would inherently discriminate against women.[68] In contrast to the more absolutist U.S. constitutional position, expressive and associational rights are depicted as being instrumental to democracy and pluralism rather than goods in themselves.[69] In this way, a rather dismissive response to disquiet about proscription is easier to maintain under the relativist approach of the European Convention on Human Rights 1950 (as adopted for the U.K. Bill of Rights, The Human Rights Act 1998)[70] than it would be under U.S. First Amendment jurisprudence.[71]

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[62] HOME OFFICE COMM'N DIRECTORATE, ANIMAL WELFARE – HUMAN RIGHTS: PROTECTING PEOPLE FROM ANIMAL RIGHTS EXTREMISTS 18 (2004).

[63] *Id.* at 16-17.

[64] Convention, *supra* note 55, at 7 ("Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.").

[65] *Id.* at 6 ("The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime . . . .").

[66] *See also* Gündüz v. Turkey, App. No. 59745/00, 2003-XI, 41 E.H.R.R. 5 (2003); Herri Batasuna & Batasuna v. Spain, App. Nos. 25803/04, 25817/04, (2009), *available at* http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/.

[67] *See* United Communist Party of Turkey v. Turkey, App. No. 19392/92, 1998-I, 26 E.H.R.R. 121, 154 (1998); Socialist Party v. Turkey, App. No. 21237/93, 1998-III (1998), *available at* http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/; Partidul Comunistilor (Nepeceristi) & Ungureanu v. Romania, App. No. 46626/99, 2005-I, 44 E.H.R.R. 17, 352-58 (2005).

It is not intended to describe in detail the implementation of this tradition of proscription. It is sufficient to understand for present purposes that much of the purpose of proscription is symbolic[72]—to express society's revulsion at violence as a political strategy as well as its determination to stop to it. It is also important to underline its executive basis. The process of proscription begins with section 3(3), by which the Secretary of State may by order add an organization to those already listed on the face of the Act in Schedule 2. The criteria for action under section 3(3) are subjectively worded—by section 3(4), orders can be made against a group if "he believes that it is concerned in terrorism," a belief which may be derived under section 3(5) if an organization (a) commits or participates in acts of terrorism; (b) prepares for terrorism; (c) promotes or encourages terrorism; or (d) is otherwise concerned in terrorism. While subjective on paper, in *Lord Alton of Liverpool (In the Matter of The People's Mojahadeen Organization of Iran) v. Secretary of State for the Home Department* (hereinafter the "*Alton* case"),[73] the test in section 3(4) has been interpreted as applying in two stages. The first stage is whether the Secretary of State has an honest belief on reasonable grounds to satisfy the statutory test in section 3(4). Then a second stage addresses whether discretion should be used to apply proscription on policy grounds. An honest belief on reasonable grounds can only be formed through materials known to the decision-maker—the decision is personal and cannot be delegated.[74] That case also demanded "current, active steps" by way of proof of being "concerned in" terrorism; the mere contemplation of the possibility of some future violence is not enough.[75] Thus, the Court of Appeal distinguished between one group that has temporarily ceased terrorism "for tactical reasons" with another that has decided to resile from violence, "even if the possibility exists that it might decide to revert to terrorism in the future."[76]

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[68] The level of political support is no longer treated as crucial, and there is the counter-balance that *jihadi* groups unequivocally espouse violence: Refah Partisi v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98,41344/98, 2003-II, 37 E.H.R.R. (2003); Sahin v. Turkey, App. No. 44774/98, 2005-XI, 44 E.H.R.R. 5 (2005); Kalifatstaat v. Germany, App. No. 13828/04 (2006), *available at* http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/. Compare the variant view of IAN CRAM, TERROR AND THE WAR ON DISSENT: FREEDOM OF EXPRESSION IN THE AGE OF AL-QAEDA 61 (2009)

[69] German Communist Party v. Germany, App. No. 350/57, 1 Y.B. Eur. Conv. on H.R. 222; Retimag v. Germany, App No. 712/60, 4 Y.B. Eur. Conv. on H.R. 384; Norwood v. United Kingdom, App. No. 23131/03, 2004-XI, 40 E.H.R.R. SE11 (2005); *see* Eva Brems, *Freedom of Political Association and the Question of Party Closures*, *in* POLITICAL RIGHTS UNDER STRESS IN 21ST CENTURY EUROPE 120 (Wojciech Sadurski, ed. 2006).

[70] *See* Clive Walker & Russell L. Weaver, *The United Kingdom Bill of Rights 1998: The Modernisation of Rights in the Old World*, 33 U. MICH. J.L. REFORM 497 (2000).

[71] *See* STEFAN SOTTIAUX, TERRORISM AND THE LIMITATION OF RIGHTS: THE ECHR AND THE US CONSTITUTION (2008).

[72] See the view of Home Secretary Roy Jenkins, *IRA Terrorism in Great Britain* (C(74)139, National Archives, London, 1974) para. 3.

There is little doubt that the vast majority of the fifty or so listed organizations have in fact engaged in terrorism and are still capable of doing so. Few have ever challenged their banning orders, and only one, the People's Mojahadeen Organization of Iran, has been successful. Many of the same groups are banned by other countries, and some appear in terrorism finance lists issued by either the United Nations or the European Union.[77]

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[73] Sec'y of State for the Home Dep't v. Lord Alton of Liverpool, [2007] PC/02/2006 at ¶¶ 67, 68, *available at* http://www.siac.tribunals.gov.uk/poac/Documents/outcomes/PC022006%20PMOI%20FINAL%20JUDGMENT.pdf; Sec'y of State for the Home Dep't v. Lord Alton of Liverpool [2008] EWCA (Civ) 443 [22], [2008] 1 W.L.R. 2341 [2350] (U.K.).

[74] *Alton* case, [2007] PC/02/2006 at ¶ 130.

[75] *Id.* at ¶¶ 124, 128.

[76] *Alton* case, [2008] EWCA (Civ) 443 [38], [2008] 1 W.L.R. 2341 [2355] (U.K.).

However, the same degree of complacency does not exist in relation to the second tranche of proscription powers, as granted by the Terrorism Act 2006. The Act essentially extends the basis for militant responses from deeds to words. It represents one of a number of policies[78] which reflect the stark warning from the Prime Minister, Tony Blair, issued in the aftermath of the July 2005 bombings in London on August 5, 2005: "Let no one be in any doubt, the rules of the game are changing."[79]

Commitment to legislation on glorification had been promised in the Labour Party's May 2005 election manifesto,[80] but the perceived need for action became acute after the London bombings of July 7, 2005.[81] Fear of the radicalization of young Muslim men by foreign extremists who were seen as poisoning vulnerable minds, drew from the Prime Minister a 12-point plan which included the banning of organizations that encourage extremism.[82] In the background, the intolerance of foreign dissidents was marked after September 11, 2001 at an international level by UNSC Resolution 1373, which calls for action against asylum-seekers involved in terrorism.[83] International law took more definite shape, with Article 5 of the Council of Europe Convention on the Prevention of Terrorism of 2005 demanding domestic offenses to outlaw the public provocation of terrorism offenses.[84] Further impetus for action was provided by the United Nations Security Council Resolution 1624 of September 14, 2005. The Resolution "[c]alls upon all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to: (a) Prohibit by law incitement to commit a terrorist act or acts." Having proposed new domestic legislation, in the shape of what became the Terrorism Act 2006, including its section 1 offense, Prime Minister Blair found himself the following month in New York as a principal mover of this resolution. From his position of power, he was able to lay the text of the resolution and speak forcefully for action against "poisonous propaganda."[85] As a neat trick, the passage of the UN Security Council Resolution was then cited in aid as one justification for the suppression of speech under what became section 1 of the Terrorism Act 2006.[86]

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[77] *See* S.C. Res. 1267, ¶ 1(c)-(d) U.N. Doc. S/RES/1267 (Oct. 15, 1999).

[78] *See* Walker, *supra* note 35, at 428-33.

[79] Rosemary Bennett & Richard Ford, *Row Over Tougher Rules on Preachers of Hate*, TIMES (London), Aug. 6, 2005, at p. 1.

[80] LABOUR PARTY, BRITAIN FORWARD NOT BACK 53 (2005).

[81] *See* HOME OFFICE, REPORT OF THE OFFICIAL ACCOUNT OF THE BOMBINGS IN LONDON ON THE 7TH JULY 2005, 2005-6, H.C. 1087 (U.K.).

[82] Bennett & Ford, *supra note* 79, at p. 1; Alan Cowell, *Blair Vows New Laws to End Sanctuary for Muslim Extremists*, N.Y. TIMES, Aug. 6, 2005, at A1.

[83] S.C. Res. 1373, ¶ 3(f), U.N. Doc. S/RES/ 1373 (Sept. 28, 2001).

[84] CONVENTION ON THE PREVENTION OF TERRORISM, May 16, 2005, COUNCIL OF EUROPE, C.E.T.S. 196, art. 5; *see also* COMMITTEE OF EXPERTS ON TERRORISM, COLLECTION OF RELEVANT CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS RELATED TO "APOLOGIE DU TERRORISME" AND "INCITEMENT TO TERRORISM" (2004);

The first relevant measure in the 2006 Act extends proscription to groups engaging in glorification. Although section 3(5)(c) of the 2000 Act already allows proscription where an organization promotes or encourages terrorism, the link to action is even less direct under the 2006 Act. Its emphasis is on speech and not deeds. Furthermore, the thrust of the power is aimed for the first time against domestic-based non-Irish groups.

Powers to proscribe organizations that glorify terrorism are inserted by section 21 of the Terrorism Act 2006. A new section 3(5A) to the Terrorism Act 2000 specifies that the power to proscribe under section 3(5)(c) shall encompass the "unlawful glorification of the commission or preparation (whether in the past, in the future, or generally) of acts of terrorism." "Glorification" requires the reasonable expectation that the audience will emulate terrorism in present circumstances (section 3(5B)), and it comprises any form of praise or celebration

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JOINT COMMITTEE ON HUMAN RIGHTS, THE COUNCIL OF EUROPE CONVENTION ON THE PREVENTION OF TERRORISM, REPORT, 2006-07, H.L. 26, H.C. 247 (U.K.); Adrian Hunt, *The Council of Europe Convention on the Prevention of Terrorism*, 4 EUR. PUB. L. 603 (2006); Walker, *supra* note 35.

[85] S.C. Res. 5261, p. 9, U.N. Doc. S/PV.5261 (Sept. 14, 2005).

[86] 438 PARL. DEB., H.C. (6th ser.) (2005) 329; *see* Ben Saul, *Speaking of Terror: Criminalising Incitement to Violence*, 28 U.N.S.W.L.J. 868 (2005).

(section 3(5C)). The boundaries of glorification are uncertain and threatening to free speech since they exceed the encouragement of crime,[87] but changes made in the drafting to Part I of the 2006 Act were reflected here too. As a result, the sponsoring government minister was sure that the final formula would distinguish "cultural events or those that celebrate a part of our collective memory, such as Guy Fawkes and bonfire night, and people who glorify acts of terror to try to encourage similar acts here and now in existing circumstances."[88] The same distinction would apply to Irish celebrations of the past deeds of Michael Collins or William of Orange, depending on whether the praise relates to a heroic history or future emulation.

A potential problem with the focus on speech might be the ascription of responsibility to an organization. Must every remark by every member be taken as "official" policy, or must impugned statements emanate from prominent or multiple members?[89] The same point could arise with unsanctioned activities, but violent acts probably require joint planning and often evince formal claims of responsibility. It is easier to make a wayward impulsive remark than to carry out an impromptu bombing.

Two groups (Al-Ghurabaa and The Saved Sect) were banned in July 2006, fairly soon after the passage of the legislation on March 30, 2006.[90] Five more groups were listed in January 2010.[91] These were claimed by the Home Office to be variant names of the two groups banned in 2006,[92] though in terms of organizational history, the founding body was al Muhajiroun.

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[87] 438 PARL. DEB., H.C. (6th ser.) 985 (2005).

[88] 438 PARL. DEB., H.C. (6th ser.) 994 (2005).

[89] Saul, *supra* note 86, at 880.

[90] 449 PARL. DEB., H.C. (6th ser.) 490 (2006); *see* QUINTAN WIKTOROWICZ, RADICAL ISLAM RISING: MUSLIM EXTREMESIM IN THE WEST (2005).

[91] Prevention and Suppression of Terrorism: The Proscribed Organisations (Name Changes) Order, 2010, SI 2010/34 (U.K.).

[92] The proscription power to deal with variant names is in the Terrorism Act 2006, § 22. It allows for a statutory instrument without the scrutiny of the affirmative procedure, i.e., a positive vote for the order which in turn requires a debate. *Id.*

Table 1: Proscription of group glorification

Al-Ghurabaa	Al-Ghurabaa ("The Strangers") is an Islamist group. It succeeded Al-Muhajiroun.
Al-Muhajiroun	Al-Muhajiroun ("The Emigrants") was founded by Omar Bakri Muhammad and others in Saudi Arabia in 1983.It was disbanded in 2004 but relaunched in 2009.
Call to Submission	A variant name of the other groups here listed.
Islam 4 UK	This Islamist group was led by Anjem Choudary and became prominent for its involvement in public protests.
Islamic Path	A variant name of the other groups here listed.
London School of Sharia	A variant name of the other groups here listed. Anjem Choudary adopted the title of "Judge of the Shariah Court" of the U.K.
The Saved Sect	The Saved Sect (formerly the Saviour Sect) pursues the mission of speaking out for proper standards for Muslims living in Western countries so as to ensure their salvation.

A minimal amount of detail was divulged by way of justification for the selections in 2006. One element of evidence against Al-Ghurabaa concerned the following comments by a representative about the London bombings of 2005: "What I would say about those who do suicide operations or martyrdom operations is that they're completely praiseworthy. I have no allegiance to the Queen whatsoever or to British society; in fact if I see mujahideen attack the UK I am always standing with the Muslims."[93]

The 2010 proscriptions were much more openly argued. These bans were provoked by the announcement by Islam 4 UK of a protest march through Wootton Bassett, the location where the corteges of service personnel killed in Afghanistan are informally honored by the public after the bodies have been flown to nearby RAF Lyneham. The protest was not intended to coincide with any funeral processions, but it was condemned by Prime Minister Gordon Brown as "abhorrent and offensive."[94] The Home Secretary, Alan Johnson, initially indicated there might be a ban on any procession under the Public Order Act 1986, section 13.[95] Section 13 is regularly used against the marches of the far-right and their Muslim opponents or by Muslim groups and their far-right opponents.[96] However, Islam 4 UK gave no advance notice of any procession (required under section 11) and then announced it was cancelling any plans before the proscription order came into force. Thus, its action might be interpreted as primarily a provocation, designed to achieve publicity about itself and its views and to focus public attention on the legitimacy of British military action in Afghanistan. It was markedly successful in achieving its aims. Thus, the key figure in Islam 4 UK, Anjem Choudary, appeared in the mainstream media and thereby gained a degree of public exposure beyond his wildest dreams.[97]

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[93] 449 PARL. DEB., H.L. (5th ser.) (2006) 493.

[94] Riazat Butt, *Brown Condemns 'Abhorrent' Islamist Wootton Bassett Protest Plan*, GUARDIAN, Jan. 5, 2010, *available at* http://www.guardian.co.uk/world/2010/jan/04/wootton-bassett-islam4uk-parade-troops#.

[95] Public Order Act, 1986, c. 64, § 13 (U.K.). Section 13 states in pertinent part that:

> (1) If at any time the chief officer of police reasonably believes that, because of particular circumstances existing in any district or part of a district, the powers under section 12 will not be sufficient to prevent the holding of public processions in that district or part from resulting in serious public disorder, he shall apply to the council of the district for an order prohibiting for such period not exceeding 3 months as may be specified in the application the holding of all public processions (or of any class of public procession so specified) in the district or part concerned.
>
> (2) On receiving such an application, a council may with the consent of the Secretary of State make an order either in the terms of the application or with such modifications as may be approved by the Secretary of State.

[96] Recent examples have occurred in Burnley in June 2001. *See* JOINT STATEMENT ON BEHALF OF BURNLEY BOROUGH COUNCIL AND LANCASHIRE CONSTABULARY, PROHIBITION ORDER GRANTED IN BURNLEY (2001), *available at* http://www.burnley.gov.uk/site/scripts/news_article.php?newsID=11584. They have also occurred in Luton in August 2009. *See* LUTON BOROUGH COUNCIL, BANNING ORDER APPROVED TO PREVENT 'UNOFFICIAL' MARCH IN LUTON (2009), *available at* http://www.luton.gov.uk/0xc0a80123%200x0e6fb2a6.

The officially appointed independent reviewer of anti-terrorism legislation, Lord Carlile, predicted in 2005 that there could be "a significant number of additional proscriptions" through "reducing the opportunity for disaffected young people to become radicalized towards terrorism."[98] In response, the government has shown restraint at most times in relation to potential candidates.[99] Most notably, Hizb ut-Tahrir,[100] a transnational movement established in 1953 which advocates the establishment of a Caliphate and *Sharia* laws in Arab countries, has not been banned in the United Kingdom, unlike, for example, in Germany.[101] Nevertheless, it "remains an organization of concern and is kept under close review."[102] It was mentioned in the 2010 election manifesto of the Conservative Party as a candidate for proscription.[103] Whether that course of action will prove to be a worthwhile venture may be doubted. The profusion of organizational names ensnared in the 2010 order points to an endemic weakness in the mechanism of proscription as applied to many *jihadi* movements. These groups are far removed from the historically defined and geographically confined proponents of Irish political violence or other nationalist groups whose names are the legends in songs and on gravestones. Thus, little social or political capital is invested in names such as Islam 4 UK, and their adherents have no compunction about inventing new variants as replacements if necessitated by proscription.

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[97] *See* Press Release, Quilliam, Quilliam Director Challenges Islam 4 UK Leader on Newsnight, Jan. 13 2010, http://www.quilliamfoundation.org/index.php/component/content/article/612.

[98] *Compare* HOME DEPARTMENT, GOVERNMENT REPLY TO LORD CARLILE OF BERRIEW Q.C.: REPORT ON THE OPERATION IN 2007 OF THE TERRORISM ACT 2000 AND PART 1 OF THE TERRORISM ACT 2006, REPORT, 2008, Cm. 7429, at ¶ 50 [hereinafter 2007 REPORT], *with* Lord Carlile, In Full: Lord Carlile Report on Terrorism Bill, TIMES (London), Oct. 12, 2005, at ¶ 51-52, *available at* http://www.timesonline.co.uk/tol/news/uk/article577744.ece [hereinafter Carlile Report].

[99] For example, Ahlus Sunnah wal Jamaah, the Muballigh, the Islamic Thinkers Society, the Society of Muslim Lawyers, the Supporters of Sharia, and Tablighi Jama' are listed in: 449 PARL. DEB., H.C. (6th ser.) 496 (2006).

[100] *See* Emmanuel Karajiannis & Clark McCauley, *Hizb ut Tahir al-Islami: Evaluating the Threat Posed by a Radical Islamic Group that Remains Nonviolent*, 18 TERRORISM & POL. VIOLENCE 315 (2006); HOURIYA AHMED & HANNAH STUART, THE CENTRE FOR SOCIAL COHESION, HIZB UT-TAHRIR: IDEOLOGY AND STRATEGY (2009).

[101] On January 10, 2003 the German *Bundesministerium des Innern* issued a decision under the Law on Associations (*Vereinsgesetz*) by which it proscribed the group's activities and ordered the confiscation of assets. Having failed to overturn the order in the German courts, the group is now challenging the ban before the European Court of Human Rights: Hizb ut Tahrir v Germany, App. No. 31098/08. It is also banned in several countries with a Muslim majority population, especially within the Middle East.

The idea of further restraints on militant speech about terrorism has gathered further international pace since 2006. Aside from the United Nation resolution and the Council of Europe Convention already mentioned, the European Union Council Framework Decision on Combating Terrorism was amended in 2008 so as to require the national implementation of offenses against public provocation, recruitment, and training, subject to "fundamental principles relating to freedom of expression."[104] Few European countries have adopted proscription based on the British model. However, some comparable jurisdictions beyond Europe are now banning organizations on the basis of advocacy, such as the (Australian) Anti-Terrorism Act (No. 2) 2005. The Act allows listing by the Attorney-General and prosecutions for activities where the organization advocates a terrorist act contrary to section 102(1A) of the Criminal Code.

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[102] 472 PARL. DEB., H.C. (6th ser.) 588W (2008). The position was confirmed at 716 PARL. DEB., H.L . (5th ser.) 86wa (2010).

[103] THE CONSERVATIVE PARTY, INVITATION TO JOIN THE GOVERNMENT OF BRITAIN 105 (2010).

[104] Council Framework Decision 919/JHA, art. 2, 2008 O.J. (L 330) 21, 22 (EU) (Amending Framework Decision on Combating Terrorism 475/JHA, art. 3, 2002 O.J. (L 164) 3 (EU)); *see* HOUSE OF COMMONS EUROPEAN SCRUTINY COMMITTEE: SEVENTEENTH REPORT OF SESSION 2007-08, 2008, H.C. 16-xv, at ¶ 8.14 (U.K.); Shawn Marie Boyne, *Free Speech, Terrorism, and European Security: Defining and Defending the Political Community*, 30 PACE L. REV. 417 (2010).

A fuller assessment of the worth of these measures will be offered once the second part of the Terrorism Act 2006 response to militant speech has been described.

OFFENSES OF INCITEMENT OF TERRORISM

(a) Provisions

The principal and highly controversial changes brought about by the Terrorism Act 2006 in relation to extremist speech are set out in offenses in sections 1 and 2. The core offense in section 1(1) relates to the publication of statements that are "likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism" or specified offenses (referred to as "Convention offences" and listed in schedule 1, subject to change by affirmative order under section 20(9)).[105] Publication of one's statement is the core of the *actus reus*.[106] The "statement" may take many formats under section 20(6), including words, sounds, or images, and, by section 20(4), can be published "in any manner" such as through an electronic service.[107] A "statement" may be part of a wider message and need not be confined to terrorism or offenses in, or with respect to, the United Kingdom.[108] But section 1(4) demands that account be taken of the contents as a whole and the circumstances and manner of publication. For instance, "there is a difference in how an academic thesis on an issue and a radical and inflammatory pamphlet are likely to be understood."[109]

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[105] Terrorism Act 2006, c. 11, § 1 (U.K.).

[106] *Id.* § 1(2)(a).

[107] *Id.* § 20. By section 20(5), providing a service includes making a facility available.

[108] L.H. Leigh, *The Terrorism Act 2006: A Brief Analysis*, 170 JUST. OF THE PEACE 364 (2006).

[109] Terrorism Act 2006, c. 11, § 1 (U.K.).

The statement must be made to "members of the public," who must be in the multiple and are distinct from "persons" in a private conversation.[110] If the statement is made at a meeting, it must be a meeting that is open to the public.[111] By section 20(3), the "public" can include the public (or any section of it) of any part of the United Kingdom or of a country or territory outside the United Kingdom.[112] Furthermore, in so far as it relates to "Convention offences," section 1 is within the parameters of section 17 of the Act (discussed below), which means that the offense could be committed by Palestinians in Gaza and Pakistanis in Peshawar.[113] The offense does not require that all targeted members of the public are likely to be affected; the influenced subset must comprise "some" which could mean one or more affected recipients.[114] In applying the impact test, juries may face challenging calculations where the statement is confined to a section of the public consisting of "small cohesive congregations."[115] The limit in the offense to a public context is odd, given the mischief of radicalization.[116]

As for the *mens rea*, in section 1(2)(b), the publisher must either "intend members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare, or instigate acts of terrorism or Convention offences," or be subjectively "reckless as to whether members of the public will be so directly or indirectly encouraged" by the statement.[117] The original draft of the offense lacked this element of subjective specific intent—it was sufficient that there was intent as to publication and reasonable belief as to encouragement.[118] There was prolonged opposition to that version,[119] which was seen as reviving the version of inadvertent recklessness in *Metropolitan Police Commissioner v. Caldwell*[120] despite its reversal in by *R v. G.*[121] The other notable aspect of the *mens rea* is that the defendant must seek to affect multiple members of the public,[122] so some of the queries about the extent of publication may become irrelevant. The requirement points again to a strong public order element.

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[110] 676 PARL. DEB., H.L. (5th ser.) (2005) 435.

[111] *Compare* Terrorism Act 2006, c. 11, § 20(3), *with* Public Order Act, 1986, c. 64, § 16 (U.K.).

[112] Terrorism Act 2006, c. 11, § 20(3) (U.K.).

[113] *See* ALUN JONES, RUPERT BOWERS, & HUGO D. LODGE, BLACKSTONE'S GUIDE TO THE TERRORISM ACT 2006 2 (2006). Prosecution is subject to section 19(2). Terrorism Act 2006, c. 11, § 19(2) (U.K.).

[114] It has been suggested that "some" requires more than a single person. Terrorism Act 2006, c. 11, § 2(6) (U.K.). *See also* JONES ET AL, *supra* note 113, at ¶ 2.18. *But see* Terrorism Act 2006, c. 11, § 1(2)(b) (U.K.).

[115] *See* JONES et al, *supra* note 113, at ¶ 2.35.

[116] *But see* Public Order Act, 1986, c. 64, § 18 (U.K.); HOME OFFICE, REVIEW OF PUBLIC ORDER LAW, 1985, Cm. 9510, at ¶ 6.7 (U.K.).

[117] Terrorism Act 2006, c. 11, § 1(2)(b)(i-ii) (U.K.).

By section 1(5), it is irrelevant whether the encouragement relates to one or more particular acts of terrorism or specified offenses, or of a particular description, or generally.[123] This provision should not, however, excuse the prosecution from specifying the one or more acts or offenses that were relevant.[124] It is also no defense under section 1(5)(b) to show that the dissemination fell on deaf ears—in other words, that no person was in fact encouraged or induced by the statement.[125] The offense considers the objective tendency of the publication. However, where the allegation is of a recklessly made statement, it is a defense under section 1(6) to show that the statement neither expressed the originator's views nor had his endorsement and that it was clear, in all the circumstances of the statement's publication, that it did not express his views and (unless in receipt of a notice under section 3(3)) did not have his endorsement.[126] Thus, the government intended a legal rather than an evidential burden to be placed on the defense,[127] though the precedent of the *Attorney General's Reference (No.*

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[118] *See* 438 PARL. DEB., H.C. 834 (6th ser.) (2005).

[119] 676 Parl. Deb., H.L (5th ser.) 430 (2005).

[120] [1982] A.C. 341 (U.K.).

[121] [2003] UKHL 50 [45], [2004] 1 A.C. 1034.

[122] 676 PARL. DEB., H.L. (5th ser.) (2005) 435.

[123] Terrorism Act 2006, c. 11, § 1(5) (U.K.).

[124] *Compare id., with* Adrian Hunt, *Criminal Prohibitions on Direct and Indirect Encouragement of Terrorism*, 2007 CRIM. L. REV. 441, 441-58.

[125] Terrorism Act 2006, c. 11, § 1(5)(b) (U.K.).

[126] *Id.* § 1(6).

[127] 676 PARL. DEB., H.L. (5th ser.) (2005) 455; 678 PARL. DEB., H.L. (5th ser.) (2006) 217.

4 of 2002)[128] strongly suggests that the courts might take another view.

The most controversial aspect of the offense is indirect encouragement, and so Parliament sought to apply further clarifications and limits.[129] By section 1(3), the indirect encouragement of terrorism includes a statement that "glorifies" the commission or preparation of acts of terrorism or specified offenses (either in their actual commission or in principle) but only if members of the public could reasonably be expected to infer that the glorified conduct that should be "emulated by them in existing circumstances."[130] The continued mention of "glorification" reflects a vestige of the pre-parliamentary draft of the Bill, which included an offense of glorification distinct from the offense of encouragement.[131] The impact is on members of the public at large and not a particular audience, as under section 1(1). In this way, a predictive application of "likely impact" is replaced by a wholly objective test where the jury can put themselves in the shoes of an audience.[132] It follows that it is no defense to show that an actual audience did not believe there was glorification, though this circumstance can be pleaded to direct incitement or other indirect incitements.

The notion of "emulation" ensures that the words uttered should be understood as more than rhetorical. Consequently, praise for historical violence, such as the armed occupation of the General Post Office, Dublin, in 1916, is not an offense, unless the statements can be understood to resonate with the present and to guide future action. The position may be clearer where the speaker glorifies ongoing or future (but not futuristic) acts of terrorism since the possibility of replication is then more palpable and practicable. Thus, a declaration that most devout British Muslims were "over the moon" about the September 11, 2001 attacks refers to an historical act when uttered in 2005, but must sail close to section 1(3) when allied to the statement that "[u]ltimately, if your brothers and sisters were being killed in any part of the world, you would make your utmost effort to try to help them."[133]

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[128] [2004] UKHL 43, [2003] 3 W.L.R. 1153 (U.K.), *rev'd*, Sheldrake v. Dir. of Pub. Prosecutions, [2004] UKHL 43, [2005] 1 A.C. 264 (U.K.); *see also* JONES ET AL, *supra* note 113, at ¶ 2.52.

[129] *See* 679 PARL. DEB., H.L. (5th ser.) (2006) 136; 680 PARL. DEB., H.L. (5th ser.) (2006) 241.

[130] Terrorism Act 2006, c. 11, § 1(3) (U.K.).

[131] *See* Carlile Report, *supra* note 98; Eric Barendt, *Threats to Freedom of Speech in the United Kingdom?*, 28 U.N.S.W.L.J. 895, 897 (2005).

[132] *See* JONES ET AL, *supra* note 113, at ¶ 2.41.

"Glorify" is partly defined in section 20(2) as including "praise or celebration."[134] An all-embracing working (non-legal) definition was proffered by a Home Office Minister as follows: "To glorify is to describe or represent as admirable, especially unjustifiably or undeservedly."[135] Section 20(7) clarifies that references to conduct to be "emulated in existing circumstances" include references to conduct that is illustrative of a type of conduct that should be so emulated.[136] For example, a statement glorifying the bombing of a bus at Tavistock Square on July 7, 2005 and encouraging repeat performances may be interpreted as an encouragement to emulate attacks on the transport network in general. The government's advice for speakers wishing to avoid glorification is that they should "preface their remarks with the statement that they do not condone or endorse acts of terrorism or encouraging people to kill others. They could express sympathy and even support for the activity, but not in a way that encourages people to commit acts of terrorism."[137] This "love-hate" formula—love the cause but hate violent means—is not a magic incantation that wards off all iniquity. Juries may consider the context of words and the sincerity of speakers, as made clear by section 1(4).[138]

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[133] These words were spoken by Hassan Butt. Aatish Taseer, *A British Jihadist*, PROSPECT, Aug. 2005, *available at* http://www.prospect-magazine.co.uk/pdfarticle.php?id=6992.

[134] Terrorism Act 2006, c. 11, § 20(2) (U.K.).

[135] 677 PARL. DEB., H.L. (5th ser.) (2006) 583.

[136] Terrorism Act 2006, c. 11, § 20(7) (U.K.).

[137] 439 PARL. DEB., H.L. (5th ser.) (2005) 429; *see also* 676 PARL. DEB., H.L. (5th ser.) (2005) 458.

[138] Terrorism Act 2006, c. 11, § 1(4) (U.K.).

There is no illumination of the meaning of "indirect incitement" beyond the concept of glorification.[139] Presumably, an incitement is not direct when it is less than an explicit stimulus but still predictably steering towards an outcome. Within this residue of indirect incitement, any requirement of emulation is absent.

The overall impact is to criminalize generalized and public encouragements—that terrorism would be a good thing, without stating where or when or against whom. In comparison, the "normal" law of criminal encouragement in Part II of the Serious Crime Act 2007 requires the encouragement of an act that would amount to one or more offenses and at least with the belief that one or more offenses would be committed as a consequence.[140] Section 1 of the Terrorism Act 2006 advances these normal boundaries, in the case of direct incitement, by specifying that it is an offense "to incite people to engage in terrorist activities generally" and extra-territorially.[141] In the case of indirect incitement, it is arguably an offense "to incite them obliquely by creating the climate in which they may come to believe that terrorist acts are acceptable."[142] How this differs from "normal" incitement remains uncertain. The "normal" law does not use the terms "direct" and "indirect" but does occasionally accord a wide meaning to "encourage," such as in cases of speed trap detection machines or books giving advice on the production of cannabis.[143] Perhaps the absence of any requirement of intended emulation outside of the realm of glorification could be one key difference, though the absence of actual audience reaction is less of a distinction under the 2007 Act.[144]

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[139] *See* Hunt, *supra* note 124, at 452 (2007); Tufyal Choudhury, *The Terrorism Act 2006: Discouraging Terrorism*, *in* EXTREME SPEECH AND DEMOCRACY 468 (Ivan Hare & James Weinstein, eds., 2009).

[140] Serious Crime Act 2007, c. 27, §§ 44-49 (U.K.).

[141] *Id.* § 1 (U.K.). *But see* Criminal Justice (Terrorism and Conspiracy) Act, 1998, c. 40 (U.K.).

[142] 676 PARL. DEB., H.L. (5th ser.) (2005) 432-3, Baroness Scotland. *Compare with* Leigh, *supra* note 108, *and* Raphael Cohen-Amalgor, *Boundaries of Freedom of Expression Before and After Prime Minister Rabin's Assassination*, *in* LIBERAL DEMOCRACY AND THE LIMITS OF TOLERANCE: ESSAYS IN HONOR AND MEMORY OF YITZHAK RABIN 80, 83 (2000).

[143] Invicta Plastics Ltd. v. Clare, [1976] R.T.R. 251 (Eng.); R v. Marlow, [1998] 1 Crim. App. (S.) 273, 275 (Eng.); Hunt, *supra* note 124, at 453-55.

Having dealt with the originators of statements in section 1, section 2(1) seeks to put a stop to the secondary dissemination of terrorist publications with intent or recklessness as to direct or indirect encouragement to acts of terrorism.[145] Closely parallel to section 1(3), the meaning of indirect encouragement is explained in section 2(4). The activity involved in a "terrorist publication" is distribution, circulation, giving, selling, lending, offering for sale or loan, provision of a service to others that enables them to access or acquire,[146] transmitting electronically, or possessing "with a view" to the foregoing activities.[147] Possession was added at the last stage of the Bill and reflects race hatred legislation.[148] It is sufficient that possession is one of the defendant's purposes and not necessarily the prime purpose. The publication may take many formats—it means an article or record[149] that may be read, listened to, looked at, or watched.[150]

In content, a "terrorist publication" is defined in section 2(3) as containing matter of two distinct types.[151] First, it covers matter likely to be understood, by some or all of the persons to whom it is or may become available as a consequence of publication, as a direct or indirect encouragement or other inducement to them for the commission, preparation, or instigation of acts of terrorism. Second, it covers matter likely to be useful in the commission or preparation of such acts and to be understood, by some or all of those persons, as contained in the publication, or made available to them, wholly or mainly for the purpose of being so useful to them. This second leg compensates for the fact that "Convention offences" (as in Schedule 1) are not mentioned under section 2(1). The explanation for this distinction is that section 1 is tied more closely to the terms in Article 5 of the Council of Europe Convention, namely, "public provocations," whereas section 2 is more an artifact of British legislative design.[152] As a result, there is no application of extra-territorial effect under section 17 of the Terrorism Act 2006.

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[144] *See* LAW COMMISSION, INCHOATE LIABILITY FOR ASSISTING AND ENCOURAGING CRIME, 2006, Cm. 6878, at ¶ 1.3 (U.K).

[145] Subjective recklessness was inserted in line with section 1. 677 PARL. DEB., H.L. (5th ser.) (2006) 551.

[146] Terrorism Act 2006, c. 11, § 2(2) (U.K.). An example might be the running of a market stall. *See* Leigh, *supra* note 108.

[147] Terrorism Act 2006, c. 11, § 2(2) (U.K.). This definition is exclusive to section 2, so section 20(4) does not apply.

[148] *See* 678 PARL. DEB., H.L. (5th ser.) (2006) 197; Public Order Act, 1986, c. 64, § 23 (U.K.). Lord Carlile also suggested an analogy with pedophile offenses as in Criminal Justice Act, 1988, § 160 (U.K.), Carlile Report, *supra* note 98, at ¶ 25, but possession *per se* is not an offense under section 2.

[149] *See also* Public Order Act, 1986, c. 64, §§ 20(2), (8) (U.K.).

[150] Terrorism Act 2006, c. 11, § 2(13) (U.K.).

[151] *Id.* § 2(3).

The effect of a terrorist publication can be judged by reference to one or more persons to whom it is or may become available as a consequence.[153] The possibility of affecting a single person contrasts with the position under section 1. In contrast too is the possibility of judging likely impact not only on persons who were exposed but also may be exposed to the materials. In this way, the audience may in part be determined by the designs of the defendant, but it might also be affected by the choice of medium. For example, it will be difficult to delimit the audience for an internet posting. It is also notable that the offense mentions "persons" and not members of the public as in section 1, which means that private circulations of public statements can be prohibited. An explanation for the distinction is again that section 2 does not directly derive Article 5 of the 2005 Convention.

The concept of "terrorist publication" is explained further by section 2(5). The nature of the publications must be determined at the time of the conduct in section 2(2) and with regard both to the entire contents of the publication and to the circumstances in which that conduct occurs. It is irrelevant whether the dissemination relates to particular, generic, or general acts of terrorism.[154]

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[152] Hunt, *supra* note 124, at 444-45.

[153] Terrorism Act 2006, c. 11, § 2(6) (U.K.).

[154] *Id.* § 2(7).

The *mens rea* of section 2 presumably requires intention as to the forms of dissemination in sections 2(2)(a) to (e), while, for the possession offense under section 2(2)(f), there must be an intent to possess with future intent to disseminate. In addition, it is specified in section 2(1) that the person must intend or be reckless that an effect of his conduct (not necessarily the sole or prime effect) amounts to a direct or indirect encouragement or other inducement to the commission, preparation, or instigation of acts of terrorism or assistance in the commission or preparation of such acts.

Parallel to section 1(6), it is a defense under section 2(9) to show that the statement neither expressed the publisher's views nor had his endorsement and that this position was clear in all the circumstances (unless in receipt of a notice under section 3(3)).[155] By section 2(10), the defense is again confined to reckless and not intentional actions, and is also confined to encouragement offenses and not offenses relating to useful materials. Of course, it is conceivable that materials will be prosecuted as relating to both types of offense in section 2(3), and if the defense is raised in those circumstances, the jury might find it difficult to disentangle liability.[156] The defense can benefit "all legitimate librarians, academics and booksellers" (and the same applies to news broadcasters) who may have examined the article but still do not endorse the contents.[157] Nevertheless, where, for example, an academic officer suspects or believes that a student intends to use the available materials for terrorist purposes rather than scholastic endeavor, she should "as a good citizen" inform the security authorities.[158]

This injunction was taken to heart by the University of Nottingham when a student, Rizwaan Sabir, was arrested in 2008 for downloading materials in connection with his postgraduate research, together with his friend and ex-student, Hicham Yezza, to whom he had passed the materials.[159] The offending materials were an Al-Qa'ida training manual which had been published in redacted form on the U.S. Department of Justice website.[160] The Vice Chancellor, Sir Colin Campbell, warned, without much regard for the defenses in sections 1 and 2, that it is illegitimate to study the operational or tactical aspects of terrorism, as opposed to its political dimensions.[161] Lord Carlile had rightly cautioned before enactment that there was a danger that academic research into terrorism might be "turned into samizdat activity."[162]

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[155] The government intended that the defendant carries a legal burden of proof. *Compare* 678 PARL. DEB., H.L. (5th ser.) (2006) 218, *with* Carlile Report, *supra* note 98, at ¶ 25. The courts are likely to impose an evidential burden. Sheldrake v. Dir. of Pub. Prosecutions, [2004] UKHL 43, [2005] 1 A.C. 264.

[156] *See* JONES ET AL., *supra* note 113, at ¶ 2.87.

[157] 676 PARL. DEB., H.L. (5th ser.) (2005) 465; *see also* 677 PARL. DEB., H.L. (5th ser.) (2006) 554; Terrorism Act 2006, Explanatory Notes, 2006, c. 11, § 1(6) (Eng.).

[158] 676 PARL. DEB., H.L. (5th ser.) (2005) 629.

As with section 1, it is no defense that the dissemination fell on deaf ears. By section 2(8), it is irrelevant whether any person is in fact encouraged or induced or makes use of the materials. Where under section 2(10), however, the offense is one of direct or indirect encouragement only (so this is not applicable to material useful to terrorists) and the person was not acting intentionally within section 2(1)(a), there is a defense of unauthorized dissemination under section 1(9) by which it is a defense to show that the publication neither expressed the defendant's views nor had his endorsement and that this position was clear in all the circumstances (subject to receiving a notice under section 3(3)).

Section 2 exceeds the "normal" law of incitement in many respects, though much of its potential impact on third party publishers is moderated by section 2(9). Thus, the important impact is upon sympathetic disseminators or possessors of materials, where the accused is one step away from the original incitement and where it might be difficult to prove the sharing of the same *mens rea* as the author.[163]

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[159] *See* Polly Curtis & Martin Hodgson, *Student Researching Al-Qaida Tactics Held for Six Days*, GUARDIAN, May 24, 2008, http://www.guardian.co.uk/education/2008/may/24/highereducation.uk.

[160] THE *AL QAEDA* MANUAL, http://www.usdoj.gov/ag/manualpart1_1.pdf.

[161] Sally Hunt, *Feeding Culture of Fear Won't Defend Freedom*, TIMES HIGHER EDUC., July 24, 2008, http://www.timeshighereducation.co.uk/story.asp?storyCode=402956&sectioncode=26.

[162] Carlile Report, *supra* note 98, at ¶ 28.

[163] *See also* Hunt, *supra* note 124, at 445.

These measures are applied to cyber-terrorism[164] via section 3 of the Terrorism Act 2006, which applies the section 1 and 2 offenses to electronically produced or delivered "unlawfully terrorism-related" articles or records[165] on the internet and devises a short-circuit enforcement power. "Unlawfully terrorism-related" means, under section 3(7), either: material that constitutes either a direct or indirect encouragement or inducement to terrorism or Convention offenses; or information that is likely to be useful to the commission or preparation of such acts.[166] As in sections 1 and 2, indirect encouragement is refined in section 3(8) to include glorification, provided that there is a suggestion of emulation in existing circumstances.

The short-circuit process is that, under section 3(3), where a constable forms the opinion that a statement, article, or record held on the system of the service provider is "unlawfully terrorism-related," a notice[167] can be issued, which requires the provider to arrange for the material to become unavailable to the public and also warns that a failure to comply within two working days[168] will result in the matter being regarded, under section 3(2), as having his endorsement, and explains the possible liability under section 3(4). A failure to comply under section 3(4) can equally arise where a person initially complies with the notice but subsequently publishes or causes to be published a statement to the same effect (known as a "repeat statement").

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[164] *See generally* JAMES BRANDON, CENTRE FOR SOCIAL COHESION, VIRTUAL CALIPHATE: ISLAMIC EXTREMISTS AND THEIR WEBSITES (2008); GARY R. BUNT, ISLAM IN THE DIGITAL AGE (2003); MARTIN CHARLES GOLUMBIC, FIGHTING TERROR ONLINE (2008); GABRIEL WEIMANN, TERROR ON THE INTERNET (U.S. Inst. of Peace ed., 2006); Timothy L. Thomas, *Al Qaeda and the Internet: The Danger of "Cyberplanning"*, XXXIII PARAMATERS 112 (2003); Clive Walker, *Cyber-Terrorism: Legal Principle and Law in the United Kingdom*, 110 PENN ST. L. REV. 625 (2006).

[165] Terrorism Act 2006, c. 11, § 3(7) (U.K.). The meaning is by reference to the two categories of matter within section 2(3), with the usual definition of "indirect encouragement" in section 3(8). *Id.* §§ 2(3), 3(8).

[166] The phrase in sub-section (7)(a), "likely to be understood," demands a higher standard of proof than "capable of being understood." 676 PARL. DEB., H.L. (5th ser.) (2005) 700.

[167] *See also* Terrorism Act 2006, c. 11, § 4 (U.K.).

[168] *See id.* § 3(9).

There is a defense undersection 3(5)and (6) if the person can demonstrate to a legal burden of proof[169] that he has "taken every step he reasonably could" to prevent a repeat statement or took "every step he reasonably could" to deal with it once aware of it.[170] The phrase, "every step he reasonably could" is arguably meant to impose a higher duty of attention than "taking reasonable steps," a standard which may be satisfied overall without taking some reasonable steps. The threat regarding failure to comply is not tantamount to the commission of an offense through endorsement under sections 1 or 2, since other elements of those offenses must be proven, nor are all Convention offenses covered by section 2. Furthermore, the refusal to comply with a notice is not itself an offense, nor even is there any police power to enforce the takedown of materials.

Critics felt it to be mistaken that these restrictions on freedom of expression do not engage a judicial officer, who, more likely than a commercial service provider, could be expected to stand up for the principle of expression.[171] The government's retort was that judicial process would cause undue delay in a "fast-moving world."[172] The possibility that an overenthusiastic police officer might tread too heavily, however, is taken up by the *Home Office Guidance on Notices Issued under Section 3 of the Terrorism Act 2006*, which was promised in response to parliamentary apprehensions.[173] The Guidance advises that notices can be initiated by any constable but in practice ought to be confined to officers of the Metropolitan Police Service Counter-Terrorist Command who are trained and experienced in electronic policing. They will apply in writing or electronically, setting out reasons for the giving of the notice, to an authorizing officer of superintendent rank or above. There should also be consultation with the Association of Chief Police Officers Terrorism and Allied Matters policy lead.[174]

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[169] 678 PARL. DEB., H.L. (5th ser.) (2006) 217. This burden of proof is said to be fair and reasonable. 676 PARL. DEB., H.L. (5th ser.) (2005) 709. Lord Carlile viewed it as an evidential burden. Carlile Report, *supra* note 98, at ¶ 25. The courts may impose an evidential burden. Sheldrake v. Dir. of Pub. Prosecutions, [2004] UKHL 43, [2005] 1 A.C. 264 (appeal taken from Eng.).

[170] Terrorism Act 2006, c. 11, §§ 3(5)(a), 3(6)(b) (U.K.).

[171] *See* 679 PARL. DEB., H.L. (5th ser.) (2006) 168; Carlile Report, *supra* note 98, at ¶ 27.

[172] 676 PARL. DEB., H.L. (5th ser.) (2005) 677.

[173] 442 PARL. DEB., H.C. (6th ser.) (2006) 1472; HOME OFFICE, GUIDANCE ON NOTICES ISSUED UNDER SECTION 3 OF THE TERRORISM ACT 2006 (2007).

This Guidance, not amounting to formal "law," may not save the scheme from challenge under Articles 6, 10, and 13 of the European Convention by web publishers. Aside from lacking legal credentials, the scheme does not require reasons to be given, does not pay express regard to free expression, and does not encompass any scheme for objections.[175]

The potential operation of section 3 has to be curtailed by the impact of the Electronic Commerce Directive[176] where an information society service provider acts as an automatic "conduit" of information (Article 12), a provider of a cache for information (Article 13), or a host of information without actual knowledge of illegal activity (Article 14). It is also forbidden under Article 15 to impose a general obligation on providers, when providing the services covered by Articles 12, 13, and 14, to monitor the information that they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity. The government conceded during debates on the 2006 Act that UK-based providers who are blocked from taking action against information held on a computer in a third country by the laws of that land will be viewed as having a reasonable excuse under section 3(2).[177] It was also conceded that section 3(5), as applied to repeat statements, should not be interpreted as imposing a duty of general monitoring or prevention.[178] There was also the promise that the police should first act against the webmaster rather than the service provider.[179] The Electronic Commerce Directive (Terrorism Act 2006)

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[174] *Id.* at ¶¶ 13-16.

[175] *See* Zaoui v. Switzerland, App. No. 41615/98, (2001).

[176] Council Directive 2000/31/EC, arts. 12-14, 2000 O.J. (L 178) 12-13 (EU); *see* Electronic Commerce (EC Directive) Regulations, 2002, S.I. 2002/2013, arts. 17-19 (U.K.).

[177] 676 PARL. DEB., H.L. (5th ser.) (2005) 671.

[178] *Id.* at 672; *see also* HOME OFFICE, *supra* note 173, at ¶ 42.

[179] 676 PARL. DEB., H.L. (5th ser.) (2005) 612. This point is not reflected in the Guidance, paragraph 10. HOME OFFICE, *supra* note 173, at ¶ 10.

Regulations 2007[180] further clarify the relationship to the Electronic Commerce Directive. The government resisted any further domestic exemption for common carrier services.[181]

Alongside section 3, the download of Internet materials may be prosecuted as an offense of the possession of information useful to terrorism contrary to section 58 of the Terrorism Act 2000. An example is *R v. Muhammed*, where the defendant downloaded a vast amount of information from the Internet and was involved in the running of the At-Tibyaan website.[182] There is also an offense under section 59 of incitement of terrorism abroad where the act would, if committed within jurisdiction, constitute any offense listed in section 59(2).[183] The listed offenses are meant to equate roughly to the definition of "terrorism" in section 1 of the Terrorism Act. An illustration is *R v. Tsouli* who, under the tag of "Irhabi 007" was convicted of inciting terrorism abroad (as well as fraud) arising from his websites which carried praise for beheadings and other terrorist violence.[184] In *R v. Saleem*, the defendants, including Abu Izzadeen (Trevor Brooks), were charged with inciting terrorism overseas under section 59 (and also offenses under section 15) arising from DVDs of speeches in 2004 that encouraged support for the *mujahideen* in Fallujah and elsewhere in Iraq.[185] Since there was no evidence that funds had been collected or terrorism committed, the sentence of four and a half years was reduced by one year.

(b) Implementation

The penalties under sections 1 and 2 are, on indictment, imprisonment not exceeding seven years, a fine, or both; on summary conviction in England and Wales, imprisonment not exceeding twelve months[186] (six months in Scotland or Northern Ireland), or a fine not exceeding the statutory maximum, or both.

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[180] *See* Electronic Commerce Directive (Terrorism Act 2006) Regulations 2007, S.I. 2007/1550 (U.K.).

[181] 677 PARL. DEB., H.L. (5th ser.) (2006) 611. "Electronic communications network" is defined in the Communications Act 2003, c. 21, § 32 (U.K.).

[182] [2010] EWCA (Crim) 227 [5, 6], [2010] 3 all E.R. 759 (Eng.).

[183] HOME OFFICE AND NORTHERN IRELAND OFFICE, LEGISLATION AGAINST TERRORISM, 1998, Cm. 4178, ¶¶ 4.18-.19 (U.K.).

[184] [2007] EWCA (Crim) 3300, [2008] 2 Cr. App. R. (S.) 45 (Eng.).

[185] [2009] EWCA (Crim) 920 [44].

In *R v. Rahman*, the conviction of Rahman under the Terrorism Act 2006, section 2(2)(f), arose from an instruction to disseminate to six named persons a letter containing instructions for the distribution of Al-Qa'ida propaganda and a description of fighting.[187] Mohammed sold Islamist materials at stalls in the North of England, some which breached section 2. The Court of Appeal gave guidance that: any reduction in sentence for recklessness rather than intention would be small; the volume and content of the material disseminated would be relevant; section 2 offenses are likely to be less serious than breaches of sections 57 and 58 of the Terrorism Act 2000.[188] The conviction under section 2 of Shella Roma underlines the sentencing point. A three-year community order sufficed for seeking to print and distribute an extremist pamphlet.[189] Likewise, the "Blackburn Resistance" consisting of Ishaq Kanmi, Abbas Iqbal, and Ilyas Iqbal, were accused of promoting through Internet forums martyrdom operations against Prime Ministers Blair and Brown, as well as filming "military" exercises in a Blackburn Park for propaganda purposes.[190]

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[186] Subject to the Commencement of the Criminal Justice Act 2003, c. 44, § 154(1) (U.K.).

[187] [2008] EWCA (Crim) 1465, [2008] 4 All E.R. 661 (Eng.). Note also Malcolm Hodges, who was convicted in 2008 of reckless encouragement of jihadis to attack accountancy organizations. *Man Urged Terror Attacks on Accountancy Institutes – 10 Years after Failing Professional Exams*, MAIL ONLINE (Feb. 19, 2008), http://www.dailymail.co.uk/news/article-516448/Man-urged-terror-attacks-accountancy-institutes—10-years-failing-professional-exams.html.

[188] *Rahman*, [2008] EWCA (Crim) at ¶¶ 5, 7, 41. The sentences were five and a half years (Rahman) and two years (Mohammed). *Id.* at ¶49.

[189] *'Holy War' Mum Spared Jail*, MANCHESTER EVENING NEWS (Mar. 30, 2009), http://menmedia.co.uk/manchestereveningnews/news/s/1105509_holy_war_mum_spared_jail.

[190] Kanmi was sentenced to three years, Abbas Iqbal to two years, and llyas Iqbal to fifteen months under section 58. Russell Jenkins, *Ishaq Kanmi Faces Jail for Soliciting Murder*, TIMES (London), May 11, 2010, at 40; Kim Pilling, *Jihadi Terror Obsession Led to Pair's Conviction*, INDEP., June 23, 2010, *available at* http://www.independent.co.uk/news/uk/crime/jihadi-terror-obsession-led-to-pairs-conviction-2008115.html.

Section 28 provides for an alternative mode of disposal of section 2 materials, modeled on Schedule 3 of the Customs and Excise Management Act 1979.[191] A justice of the peace (or sheriff in Scotland) may issue a search and seizure warrant if satisfied that there are reasonable grounds for suspecting that articles falling within sections 2(2)(a) to (e)[192] are likely to be found on any premises. Proceedings for forfeiture may then be taken on information laid by, or on behalf of, the Director of Public Prosecutions, except in Scotland where no special process is specified.[193]

Forfeiture procedures are governed by Schedule 2. By paragraph 2, the relevant constable must give notice to owners or, in default, occupiers of the premises where the article was seized.[194] Any person disputing forfeiture may give written notice within one month under paragraph 3 to any police station in the police area in which the premises where the seizure took place are located.[195] If no such counter-claim is issued, the article can be treated under paragraph 5 as automatically forfeited at the end of the relevant periods.[196] If there is a counterclaim, the relevant constable must decide under paragraph 6 whether to proceed.[197] If so, the court can make an order if it finds that the article was liable to forfeiture at the time of seizure, and it is not satisfied that its forfeiture would be inappropriate.[198] If either the constable does not take proceedings or the court is not convinced to order forfeiture, the article must be remitted.[199] The venues for these civil proceedings can be, in England or Wales, either in the High Court or in a magistrates' court (with appeal to the Crown Court); in Scotland, either in the Court of Session or in the sheriff court; and in Northern Ireland, either in the High Court or in a court of summary jurisdiction (with appeal to the county court).[200]

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[191] *Compare* Terrorism Act 2006, c. 11, § 28 (U.K.), *with* Customs and Excise Management Act, 1979, c. 2, §§ 139, 143, 145, sch. 3 (Eng.).

[192] The private possession covered by section 2(2)(f) is thereby excluded. There is also a saving for legally privileged materials under the Police and Criminal Evidence Act, 1984, c. 60, § 19(6) (U.K.). 676 PARL. DEB., H.L. (5th ser.) (2005) 1244.

[193] Terrorism Act 2006, c. 11, § 28(5), (10).

[194] *Id.* § 28(2), sch. 2.

[195] *Id.* § 28(3), sch. 2.

[196] *Id.* § 28(5), sch. 2.

[197] *Id.* § 28(6), sch. 2.

[198] *Id.* § sch. 2 para. 6.

[199] It can be disposed of if it is not practicable within twelve months. *Id.* § 28(13).

Disposal by this route follows the pattern of section 3 of the Obscene Publications Act 1959.[201] The danger, however, is that this administrative route underplays the value of free expression. An owner or occupier might conceivably decline to take on the forces of the state and incur a dubious reputation. Lord Carlile argued that the jurisdiction should be exercised by professional district judges (magistrates' courts) and not magistrates,[202] although a lay element is desirable in principle.

No use has yet been made of section 3 because service providers are highly responsive to police "advice."[203] Indeed, the Guidance suggests making contact with the service provider before any notice is issued and that a "voluntary approach" should be adopted where the provider is not viewed as encouraging publication.[204]

A practical enforcement measure, which may strengthen section 3, is the establishment in 2010 by Home Office of a website which invites members of the public to report Internet pages that carry messages of hate, extremism and terrorism.[205] This follows the initiative of the Internet Watch Foundation which deals with child pornography.[206] Examples of terrorism materials include bomb-making, weapons, or poisons instructions and guides to targets, while violent extremist content is said to include "videos of beheadings with messages of 'glorification' or praise for the attackers; speeches or essays calling for racial or religious violence; messages intended to stir up hatred against any religious or ethnic group; chat forums with postings calling for people to commit acts of terrorism."[207] The reports are channeled to the police, although whether the sites are closed under section 3 may depend on intelligence gathering considerations.

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[200] *Id.* §§ 28(7) & (10).

[201] *See* GEOFFREY ROBERTSON, OBSCENITY ch. 4 (1979); Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, § 3 (Eng., Wales).

[202] Carlile Report, *supra* note 98, at ¶ 75.

[203] *See* HOME OFFICE, *supra* note 173, at ¶ 27.

[204] *Id.* at ¶¶ 27, 29 Annex C.

[205] *Reporting Terrorist and Extremist Material Online*, HOME OFFICE, https://reporting.direct.gov.uk/ (last visited Mar. 14, 2011).

[206] INTERNET WATCH FOUND., http://www.iwf.org.uk/ (last visited Mar. 14, 2011).

There is no international system to replicate "take down" measures in other jurisdictions, even though the amended EU Framework Directive on Combating Terrorism recites that "[t]he Internet is used to inspire and mobilise local terrorist networks and individuals in Europe and also serves as a source of information on terrorist means and methods, thus functioning as a 'virtual training camp.'"[208]

(c) Foreign Comparisons

The notion of *apologie du terrorisme* appeared in some European jurisdictions well before 2001.[209] Thus, the French Law of July 29, 1881 on Freedom of the Press, article 24(4), makes it an offense to utter an *apologie* for attacks on human life or criminal damage that endangers life.[210] The Spanish Penal Code, article 578, defines apology in the context of terrorism as praise of specified (terrorist) offenses or bringing about the discredit, contempt, or humiliation of victims or their families.[211] The offense itself, in article 18(2) requires the presentation of ideas or doctrines that praise or justify a crime or its perpetrator, but in a way which, by its nature and circumstances, amounts to a direct incitement to commit an offense. Neither jurisdiction uses the offense frequently,[212] but its deployment in Spain has resulted in the closure of two Basque newspapers.[213]

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[207] *Reporting Extremism and Terrorism Online*, DIRECTGOV, http://www.direct.gov.uk/en/CrimeJusticeAndTheLaw/Counterterrorism/DG_183993 (last visited Mar. 14, 2011).

[208] Council Framework Decision, 2008/919/JHA, ¶4, 2008 O.J. (L 330) 21 (EU); *see also* Ulrich Sieber & Phillip Brunst, *Cyberterrorism and Other Use of the Internet for Terrorist Purposes – Threat Analysis and Evaluation of International Conventions*, *in* CYBERTERRORISM – THE USE OF THE INTERNET FOR TERRORIST PURPOSES 9, 97 (2007).

[209] *See* OLIVIER RIBBELINK, "APOLOGIE DU TERRORISME" AND "INCITEMENT TO TERRORISM" 7 (2004).

[210] Loi Sur la Liberté de la Presse du 29 juillet 1881, *available at* http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722&dateTexte=vig.

[211] Código Penal, Ley Orgánica 10/1995, de 23 noviembre, *available at* http://www.legislationline.org/documents/action/popup/id/3812.

Other jurisdictions have responded to the European Convention of 2005 by the passage of new offenses. The German Criminal Code, section 91, passed in 2009, forbids instruction in the commission of a serious act of violence that endangers the state provided the instruction encourages the commission of the act.[214]

Away from the influence of the European concept of *apologie*, the Canadian House of Commons Standing Committee on Public Safety and National Security called for an offense of glorification in 2007, but it has not been enacted.[215] Likewise, the Australian Law Reform Commission firmly rejected an offense of "encouragement" or "glorification" of terrorism; such an offense would be too vague and would amount to "an unwarranted incursion into freedom of expression and the constitutionally protected freedom of political discourse."[216] Publications, films, and computer games, however, can be refused classification under the Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007 if deemed to advocate the doing of a terrorist act.[217] This system, operated through the Office of Film and Literature Classification, appears unduly cumbersome and blunt since it fails to take account of the circumstances of publication and consumption.[218]

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[212] RIBBELINK, *supra* note 209, at 35, 39.

[213] *See* Ian Cram, *Regulating the Media: Some Neglected Freedom of Expression Issues in the United Kingdom's Counter-Terrorism Strategy*, 18 TERRORISM & POL. VIOLENCE 335 (2006).

[214] *See* Ulrich Sieber, *Blurring the Categories of Criminal Law and the Law of War – Efforts and Effects in the Pursuit of Internal and External Security*, *in* CRIMINAL LAW BETWEEN WAR AND PEACE – JUSTICE AND COOPERATION IN CRIMINAL MATTERS IN INTERNATIONAL MILITARY INTERVENTIONS 35 (Stefano Manacorda & Adan Nieto Martin eds., 2009).

[215] GARRY BREITKREUZ, SUBCOMMITTEE ON THE REVIEW OF THE ANTI-TERRORISM ACT, RIGHTS, LIMITS, SECURITY: A COMPREHENSIVE REVIEW OF THE ANTI-TERRORISM ACT AND RELATED ISSUES 12 (2007).

[216] AUSTRALIAN LAW REFORM COMMISSION, FIGHTING WORDS: A REVIEW OF SEDITION LAWS IN AUSTRALIA, 2006, ALRC 104, at ¶ 6.24.

[217] Act 179 of 2007.

Advocacy offenses are of course constrained by U.S. constitutional law, which demands express propagation of immediate law violation that is likely to occur,[219] though less imminent and less explicit "true threats" may alternatively have found a conviction.[220] The U.S. constitutional rejection of speech content offenses may also come into play.[221] Yet, as already noted, the federal offense of "seditious conspiracy" in 18 U.S.C. § 2384 was invoked against Sheik Omar Abdel Rahman, who stirred his congregation to "do jihad with the sword, with the cannon, with the grenades, with the missile."[222]

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[218] *See Search the Classification Database: The Absent Obligation*, Classification Website, http://www.classification.gov.au/www/cob/find.nsf/d853f429dd038ae1ca25759b0003557c/5cc402f1a0d9132aca25767100790d52?OpenDocument; *Search the Classification Database: Join the Caravan*, Classification Website, http://www.classification.gov.au/www/cob/find.nsf/d853f429dd038ae1ca25759b0003557c/fbd9763e67191abdca257671007ad267?OpenDocument. Repeal is recommended by the Law Council of Australia, Anti-Terrorism Reform Project. Anti-Terrorism Reform Project, Law Council of Australia, A Consolidation of the Law Council to Australia's Advocacy in Relation to Australia's Anti-terrorism Measures § 6.3.3(1) (2009). An attempt to block the film, *The Baader-Meinhof Complex*, under German privacy laws was rejected. Birgit Clark, *In Dubio Pro Arte? No Ban for the Film* Der Baader-Meinhof-Komplex, 20 Ent. L. Rev. 178 (2009).

[219] Hess v. Indiana, 414 U.S. 105 (1973); Brandenburg v. Ohio, 395 U.S. 444 (1969); Interpretation of these terms has become less rigorous. Al-Timimi v. Jackson, 379 F. App'x 435 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 475 (2010). *Compare* Thomas Healy, Brandenburg *in a Time of Terror*, 84 Notre Dame L. Rev. 655 (2009), *with* D.G. Barnum, *Indirect Incitement and Freedom of Speech in Anglo-American Law*, 3 Eur. Hum. Rts. L. Rev. 258 (2006), *and* Eric Barendt, *Incitement to, and Glorification of Terrorism, in* Extreme Speech and Democracy 445 (Ivan Hare & James Weinstein eds., 2009).

[220] Virginia v. Black, 538 U.S. 343 (2003); Watts v. U.S., 394 U.S. 705 (1969); Planned Parenthood v. Am. Coal. of Life Activists, 290 F.3d 1058 (9th Cir. 2002).

[221] R.A.V. v. St. Paul, 505 U.S. 377 (1992); *see* Ellen Parker, *Implementation of the UK Terrorism Act 2006 – The Relationship Between Counterterrorism Law, Free Speech, and the Muslim Community in the United Kingdom Versus the United States*, 21 Emory Int'l L. Rev. 711, 747 (2007).

[222] U.S. v. Rahman, 189 F.3d 88, 104, 107 (2d Cir. 1999); *see* John Alan Cohan, *Seditious Conspiracy, the Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of Government*, 17 St. John's J. Legal Comment. 199 (2003). Note also the offense of weapons training. 18 U.S.C. § 842(p) (West 2010); Laura K. Donohue, *Terrorist Speech and the Future of Free Expression*, 27 Cardozo L. Rev. 233, 280 (2005).

ASSESSMENT

There may be two aspects to a critique of the banning of militant speech about terrorism in the ways pursued by the Terrorism Act 2006. The first is to assess whether these are legitimate tactics for a smart militant democracy. A ban should be ruled out if it infringes basic values and thereby delegitimizes the state response. The second approach might inquire as to whether viable alternative methods can have more impact without such impingement upon fundamental values. In this way, the question becomes whether the infringement upon expressive and associational rights is a proportionate tactic.

Inherent Infringement?

On the first approach, it has already been argued that expressive speech and associational activity that encourages violence need not be tolerated.[223] In *Zana v. Turkey*,[224] the applicant's statement of sympathy for the Partiya Karkeren Kurdistan (PKK) was regarded as exacerbating a violent situation and could be punished, even though he was a mayor in the region. In *Gündüz v. Turkey*,[225] the leader of an Islamic sect criticized moderate Islamic intellectuals and called his supporters to produce "one brave man among the Muslims to plant a dagger in their soft underbelly and run them through twice with a bayonet." Even as a rhetorical flourish, such language did not deserve protection from the European Court of Human Rights, nor, at the extreme end of the margin of appreciation, did a cartoon in praise of the September 11 attacks, published in the Basque Country in *Leroy v. France*.[226] But where, as in *Arslan*

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[223] *See* Arrowsmith v. United Kingdom, App. No. 7050/75, DR 19, p.5, 3 E.H.R.R. 218, 219 (1978).

[224] App. No. 18954/91, 1997-VII, 27 E.H.R.R. 667 (1999); *see also* Howard Davis, *Lessons from Turkey: Anti-terrorism Legislation and the Protection of Free Speech*, [2005] EUR. HUM. RTS. L. REV. 75; Falakaoglu v. Turkey, App. Nos. 22147/02, 24972/03, *available at* http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/; Sürek v. Turkey (No. 1), App. No. 26682/95, 1999-IV Eur. Ct. H.R. 51; Sürek v. Turkey (No. 3), App. No. 24735/94, [1999] Eur. Ct. H.R. 53.

[225] App. No. 59745/00, 2003-XI, 2, 41 E.H.R.R. 5 (2005).

[226] App. No. 36109/03, *available at* http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/.

v. Turkey,[227] the Court was sure that the words used did not incite violence, then it defended statements that alleged that the Turkish state oppressed the Kurds and so explained Kurdish "resistance" and "intifada." As made clear in *Gerger v. Turkey*,[228] broad words such as "resistance," "struggle," and "liberation" do not necessarily constitute an incitement to violence, but may do so when reporting the utterances of hunger striking prisoners.[229] Latitude is also accorded to the neutral reporting of the declarations or interviews of terrorist representatives by media professionals, as in *Sürek and Özdemir v. Turkey*,[230] to artistic and academic speech,[231] and to demonstrators protesting about genuine issues of public concern.[232] However, the limits of tolerance were again demonstrable in the judicial reviews of bans imposed in Spain upon major Basque nationalist political parties, namely, Batasuna in 2002 and Herritarren Zerrenda in 2004, as well as the disqualifications of individual Basque party candidates. The European Court of Human Rights determined that the banning of parties sympathetic to Euskadi Ta Askatasuna (ETA) met a pressing social need which had been fully considered by national courts whose margin of appreciation was to be respected, especially given its reflection of the "international preoccupation with condemning apology of terrorism."[233]

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[227] App. No. 23462/94, [1999] Eur. Ct. H.R. 41, ¶ 48; *see also* Erdoğdu v. Turkey, App. No. 25723/94, 2000-VI Eur. Ct. H.R. 223; Ceylan v. Turkey, App. No. 23556/94, 1999-IV Eur. Ct. H.R. 44.

[228] App. No. 24919/94, [1999] Eur. Ct. H.R. 46, ¶ 50; *see also* Erdoğdu v. Turkey, App. Nos. 25067/94, 25068/94, [1999] Eur. Ct. H.R. 45; Okçuoglu v. Turkey, App. No. 24246/94, [1999] Eur. Ct. H.R. 48; Polat v. Turkey, App. No. 23500/94, [1999] Eur. Ct. H.R. 49.

[229] Saygili v. Turkey (No. 2), App. No. 38991/02, [2009] Eur. Ct. H.R. 296.

[230] App. Nos. 23927/94, 24277/94, [1999] Eur. Ct. H.R. 50; *see also* Sürek v. Turkey (No. 2), App. No. 24122/94, [1999] Eur. Ct. H.R. 52; Sürek v. Turkey (No. 4), App. No. 24762/94, [1999] Eur. Ct. H.R. 54.

[231] Başkaya v. Turkey, App. Nos. 23536/94, 24408/94, 1999-IV Eur. Ct. H.R. 42; Karataş v. Turkey, App. No. 23168/94, 1999-IV Eur. Ct. H.R. 47.

[232] Yılmaz v. Turkey, App. No. 68514/01, *available at* http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/.

[233] Herri Batasuna v. Spain, App. Nos. 25803/04, 25817/04, ¶ 91, *available at* http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/.

It may be concluded that being one step removed from direct incitement to violence and being uncertain that anyone is roused to action and/or that any offense will result from publication may all cast doubt on the compliance of sections 1 and 2 of the 2006 Act with rights to expression.[234] However, judgment can only be finalized in the context of specific facts, and no British case has as yet been taken to Strasbourg. The cited precedents are not clear-cut indications as to how a British application would be treated, for the level and nature of enforcement in Britain are certainly not equivalent to those in Turkey. For instance, the Kurdish politician, Leyla Zana, was convicted in Turkey for a speech delivered at the University of London in 2008 which was not the subject of any British legal action.[235]

A further possible criticism of the Terrorism Act 2006, based on its wording and inherent imprecision of "incitement" and other terms in sections 1 and 2, is that the Act is riddled with uncertainties and anomalies.[236] The precise mechanisms by which radicalization turns into extremism and begets terrorism are unclear, and the 2006 Act might prove counterproductive where it "blurs rather than clarifies the lines between radicals and terrorists."[237] However, the English courts have viewed words such as "insulting,"[238] as compatible with Article 10, while the European Court of Human Rights has upheld the term "breach of the peace."[239] On that basis, it is doubtful

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Action was taken in France on grounds of foreign funding. *See* Parti Nationaliste Basque v. France, App. No.71251/01, [2007] Eur. Ct. H.R. 5561.

[234] *See* JOINT COMMITTEE ON HUMAN RIGHTS, *supra* note 24, at ¶ 34; Barendt, *supra* note 219, at 445, 447, 458-59; Hunt, *supra* note 124, at 452.

[235] *Pro-Kurdish Politician Sentenced to 15 Months in Prison*, BBC Monitoring Service (Anatolia, Turk.), July 28 2009. She was sentenced to fifteen months' imprisonment under the Anti-Terror Law 1991 (Act 3713) art. 7(2) for propaganda on behalf of a terrorist organization.

[236] JOINT COMMITTEE ON HUMAN RIGHTS, Counter-Terrorism Policy and Human Rights: *Terrorism Bill and related matters* (2005-05 HL 75, HC 561), at ¶ 27-28; *see also Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, ¶ 7, U.N. Doc. A/61/267 (Aug. 16, 2006) (*prepared by* Martin Scheinin).

[237] Choudhury, *supra* note 139, at 487.

[238] Hammond v. Dir. of Pub. Prosecutions, [2004] EWHC (QB) 69, ¶ 26 (Eng.).

[239] *See* Steel v. United Kingdom, App No. 24838/94, 1998-VII Eur. Ct. H.R. 95; Hashman v. United Kingdom, App No. 25594/94, 1999-VIII Eur. Ct. H.R. 133.

whether the 2006 Act is intrinsically more incapable of acting as a guide to action.

Disproportionate Infringement?

The test of proportionality might initially be tested out in relation to the question whether the myriad of clearer and less contentious offenses, which already circumscribe militant speech, make irrelevant the more sweeping (and therefore more dangerous) efforts of the Terrorism Act 2006.[240] Offenses already within the terrorism legislation catalogue include the offenses under sections 58 and 59, as already noted. Beyond that category, soliciting murder under section 4 of the Offences against the Person Act 1861 can be used even when no victim is specified.[241] Public order offenses can apply to outrages such as beheading videos[242] or vituperative protests outside an embassy.[243] The availability of alternative charges was illustrated by the first recorded conviction under the 2006 Act. Arising from materials in his possession when arrested at Glasgow Airport, Mohammed Atif Siddique was convicted not only of collecting and distributing terrorist materials, but also of offenses under sections 54, 57, and 58 of the Terrorism Act 2000, plus the Scottish offense of breach of the peace.[244]

In response to this point, a significant factor in the justification of sections 1 and 2 must reside in its ability to catch a wider range of militant speech—not just concerned with "information" as under section 58 or calls to arms abroad as under section 59—and yet still limited by the element of emulation of action. Subject to the exception of the largely unexplained non-glorifying indirect incitements, these are not pure speech crimes,[245] but they do seek to intervene before one militant speaker generates multiple militant actors.[246] Nevertheless, there may be four important qualifications to any endorsement.

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[240] *But see* JOINT COMMITTEE ON HUMAN RIGHTS, *supra* note 236, at ¶ 25 .

[241] *See* R v. Saleem [2007] EWCA (Crim) 2692 (Eng.); R v. Hamza [2006] EWCA (Crim) 2918 (Eng.); R v. El-Faisal [2004] EWCA (Crim) 456 (Eng.); T. O'Donoghue, *Glorification, Irish Terror and Abu Hamza*, 170 JUST. OF THE PEACE 291, 291 (2006).

[242] *See* David Lister, *Man Jailed for Showing Beheading Video*, TIMES (London) Sept. 29, 2005, at 3.

[243] *See* Ian Cobain & Nick Fielding, *Banned Islamists Spawn Front Organizations: Al-Ghurabaa tries to Ensure Survival with Groups Across UK*, GUARDIAN (London) July 22, 2006, http://www.guardian.co.uk/uk/2006/jul/22/terrorism.world.

[244] Michael Howie & John Robertson, *Eight Years in Jail for Scottish Muslim who Boasted of Plan to Become Suicide Bomber*, SCOTSMAN (Edinburgh) Oct. 24, 2007, at 7; David Lister, *Student was Part of Canadian Terror Plot*, TIMES (London), Sept. 18 2007, at 31. For the views of his lawyer, see Re Anwar [2008] J.C. 409 (Scot.).

First, the application of these offenses in the context of foreign regimes is problematic.[247] This point is really a criticism of the definition of "terrorism" in section 1 of the Terrorism Act 2000 and the extension of jurisdiction for offenses listed under section 17 of the Terrorism Act 2006. However, the effect can be illustrated when the section 1 offense is applied to support the revered Nelson Mandela who condoned acts of political violence against official property during his term of imprisonment,[248] or for the statement of Cherie Booth, the wife of Prime Minister Tony Blair, that "in view of the illegal occupation of Palestinian land I can well understand how decent Palestinians become terrorists."[249] What if Saddam Hussein were still in power and called upon the British government to take action against any surviving "terrorists" of Dujail who, in 1982, had attempted to assassinate him (reprisals against whom resulted in his execution in 2006)? Plots against the Libyan regime were possibly encouraged a decade or so ago,[250] then there was rapprochement after the lifting of international sanctions in 2003,[251] then even greater hostility, through sustained military intervention, was sanctioned by the United Nations in 2011.[252] Conversely, plots against Syria are openly tolerated.[253] The extension of jurisdiction leads to a slippery slope of judgments which take sides in foreign disputes and sometimes in favor of despots.

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[245] Hunt, *supra* note 124, at 450-56.

[246] *See* Owen Fiss, *Freedom of Speech and Political Violence*, *in* LIBERAL DEMOCRACY AND THE LIMITS OF TOLERANCE 70, 75 (Raphael Cohen-Almagor ed., 2000).

[247] JOINT COMMITTEE ON HUMAN RIGHTS, *supra* note 236, at ¶ 12.

[248] Lionel Bernstein, *Rivonia: Telling It as It Was*, AFRICAN NAT'L CONG., July 2, 1988, http://www.anc.org.za/show.php?include=docs/arts/1988/rivoniak.html.

[249] 438 PARL. DEB., H.L. (5th ser.) 844 (2005).

[250] Allegations were made by David Shayler. *See* Press Release, Posting of David Shayler, MI6 Plot to Assassinate Colonel Gaddafi: Police Enquiry Confirms Plot is not "Fantasy" (Nov. 11, 2001), *available at* http://cryptome.org/shayler-gaddafi.htm.

[251] UN SCR 1506 of September 12, 2003.

[252] UN SCR 1973 of March 17, 2011.

[253] *See* Richard Beeston, *Exiles Plot to Overthrow Syria's Baathist Regime*, TIMES (London), June 5, 2006, at 30.

The second qualification is that the policy of closing down channels of discourse may be counter-productive in political terms. Surely, the Northern Ireland experience illustrates the folly of freezing out political fronts. Whilst much of what violent groups have to say is unpalatable or even reprehensible, their views must be debated so that the extremists, government, and public can be educated and respond with intelligence,[254] rather than receiving only the hateful bulletins of "martyrs" such as the July 2005 suicide bomber, Mohammed Siddique Khan.[255] In line with these concerns, the European Court of Human Rights has been particularly wary of restraints on the speech of politicians.[256] Likewise, even Lord Lowry recognized membership as a "political offence" in *R v. Adams*.[257]

Third, any gains from reducing the tolerance of extreme speech may be overshadowed by resentment of stigmatization and selective repression, which may hinder policing by reducing flows of intelligence.[258] As stated by the House of Commons Home Affairs Committee,[259] rather than the sole pursuit of suppression, "the Government must engage British Muslims in its anti-terrorist strategy."

Fourth, the offenses in the 2006 Act go beyond what is required by the Council of Europe's Convention on the Prevention of Terrorism of 2005.[260] The militant United Kingdom government views this discrepancy as unproblematic,[261] but the consequent curtailments of rights may later be assessed as excessive in international forums.

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[254] 438 PARL. DEB., H.L. (5th ser.) (2005) 326.

[255] *London Bomber: Text in Full*, BBC NEWS (Sept. 1, 2005, 22:01 GMT), http://news.bbc.co.uk/1/hi/uk/4206800.stm.

[256] Isak Tepe v. Turkey, App. No. 17129/02, Eur. Ct. H.R. (2008); Ass'n Ekin v. France, App. No. 39288/98, 2001-VIII Eur. Ct. H.R.; Castells v. Spain, App. No. 11798/85, 236 Eur. Ct. H.R. (ser. A) (1992).

[257] [1978] 5 N.I.J.B (BCC).

[258] Choudhury, *supra* note 139, at 487, 481.

[259] HOME AFFAIRS COMMITTEE, TERRORISM AND COMMUNITY RELATIONS, REPORT, 2004-05, H.C. 165-1, at ¶ 225.

[260] *See* JOINT COMMITTEE ON HUMAN RIGHTS, THE COUNCIL OF EUROPE CONVENTION ON THE PREVENTION OF TERRORISM, REPORT, 2006-07 H.L. 26, H.C. 247, at ¶¶ 26-39; JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND

As a proviso to this somewhat theoretical debate about proportionality, it should be realized that the United Kingdom goals are not full of *jihadi* demagogues, though there are certainly some in that category who have fallen foul not only of section 1 of the Terrorism Act 2006 but also sections 58 and 59 of the Terrorism Act 2000, and, above all, solicitation of murder.[262] The evidence from the statistics below is that any impact from the new offenses has been largely symbolic, much as predicted and probably as expected in line with the history of proscription.[263] Few prosecutions and convictions have been recorded, though the impression from workers in the field, such as the police and groups such as Quilliam,[264] is that militant speech in public has been toned down since 2006.

HUMAN RIGHTS: TERRORISM BILL AND RELATED MATTERS, REPORT, 2005-06 H.L. 75-1, H.C. 561-1, at ¶ 41.

[261] JOINT COMMITTEE ON HUMAN RIGHTS, *supra* note 24, at 7.

[262] Offences against the Person Act 1861, c.100, § 4 (U.K.).

[263] *But see* Parker, *supra* note 221, at 712.

[264] Interviews with Clive Walker, Professor of Criminal Justice Studies, University of Leeds, in Leeds and London (April & May 2010). Quilliam is a counter-extremism think tank that mainly concentrates on *jihadi* extremism and is largely funded by the government. QUILLIAM HOMEPAGE, http://www.quilliamfoundation.org (last visited Apr. 1, 2011).

Table 2: Terrorism Offense Convictions in Great Britain[265]

Date of conviction	Possessing materials section 57; Terrorism Act 2000	Possessing information - section 58; Terrorism Act 2000	Other offenses under Terrorism Act 2000	Inciting overseas - section 59; Terrorism Act 2000	Incitement - sections 1, 2; Terrorism Act 2006	Other offenses under Terrorism Act 2006	Total
2001/2	0	0	0	0	-	-	0
2002/3	5	1	0	0	-	-	6
2003/4	2	0	0	0	-	-	2
2004/5	1	1	0	0	-	-	2
2005/6	5	2	0	3	-	-	10
2006/7	8	5	0	1	1	10	25
2007/8	1	2	1	3	3	4	14
Total	22	11	1	7	4	14	59

Aside from the alternative more specific criminal offenses mentioned earlier, other approaches might be considered to see if they would be "smarter" than the Terrorism Act 2006 approach. For instance, a classical U.S. constitutional response might be to argue for more speech not less, and to overwhelm militant speech with more persuasive non-militant speech.

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[265] *See* Lord Carlile, First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005 (2006), *available at* http://www.statewatch.org/news/2006/feb/laws-against-terror.pdf; Lord Carlile, Second Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005 (2007), *available at* http://www.statewatch.org/news/2007/feb/uk-pta-carlile-ann-report.pdf; Lord Carlile, Third Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005 (2008), *available at* http://www.official-documents.gov.uk/document/other/9781847265968/9781847265968.pdf; Lord Carlile, Fourth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005 (2009), *available at* http://www.official-documents.gov.uk/document/other/9780108508141/9780108508141.pdf; Lord Carlile, Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005 (2010), *available at* http://www.official-documents.gov.uk/document/other/9781849871518/9781849871518.pdf; Lord Carlile, Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005 (2011), *available at* http://www.official-documents.gov.uk/document/other/9780108510106/9780108510106.pdf.

Surely the values of peace and democracy are more appealing than what one United Kingdom government minister, Liam Fox, recently referred to (in connection with Afghanistan) as the conditions of "a broken 13th-century country."[266] A fine example of this approach is that some jurisdictions have indeed sought to challenge extremist speech with more speech, especially on the Internet where the chances of actually closing down communications are dim because of the trans-border nature of internet servers. For instance, the Saudi Ministry of Islamic Affairs runs the "Campaign Assakina (or Al-Sakinah)" which focuses on the correct understanding of Islamic doctrines about violence.[267] Yet, at the same time, there is also a very robust and at times abusive criminal justice and security campaign against *jihadis* in Saudi Arabia,[268] while the impact of Campaign Assakina is untested. It might be thought to be problematic for western governments to intervene effectively in debates about Islamic religious doctrine, and the very process of backing selected independent Islamic scholars to speak on behalf of the state may obviously compromise their independence. Nevertheless, the United Kingdom government has dallied with this idea by funding activities such as the "Preventing Extremism Together" (PET) Scholars' Roadshows, which involve the promotion of religious scholars who can offer alternatives to extremist doctrines.[269] In addition, the Department for Communities and Local Government has floated the idea of a board of academics and scholars based in the Universities of

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[266] Alice Thomson, Rachel Sylvester & Deborah Haynes, *Fox Flies to Afghanistan with the Aim of Speeding up British Troop Withdrawal*, TIMES (London), May 22, 2010, at 8.

[267] CAMPAIGN ASSAKINA FOR DIALOGUE HOMEPAGE, http://en.assakina.com (last visited Feb 10, 2011).

[268] *See Saudi Arabia: Human Rights in Kingdom of Saudi Arabia*, AMNESTY INT'L, http://www.amnesty.org/en/region/saudi-arabia/report-2009 (last visited Feb. 10, 2011). Reconciliation and "deradicalisation" do form a part of that campaign (the "Munasaha Programme"). *See* LEAVING TERRORISM BEHIND: INDIVIDUAL AND COLLECTIVE DISENGAGEMENT, ch. 10 & 13 (Tore Bjørgo & John Horgan eds., 2009).

[269] HOME OFFICE, COUNTERING INTERNATIONAL TERRORISM: THE UNITED KINGDOM'S STRATEGY, 2006, Cm. 6888, at ¶ 58.

Oxford and Cambridge to ensure that any false ideology is corrected.[270]

Another model for responding to militant speech (and militant deed) arises from the array of governmental responses to animal rights extremism, primarily directed at corporate targets.[271] Environmental, anti-war, and anti-globalization groups have sometimes adopted similar tactics. Whilst activists have not faced proscription, the armory of responses includes the application of "normal" laws and some new laws.[272]

The array of "normal" laws includes the mundane use of common law powers relating to breach of the peace,[273] the Public Order Act 1986,[274] the Malicious Communications Act 1988,[275] and, above all, the Protection from Harassment Act 1997.[276] Conspiracy to blackmail has been sustained against Greg Avery and others in relation to their campaigns against Huntingdon Life Sciences.[277] Beyond the criminal law are anti-social behavior orders under section 1 of the Crime and Disorder Act 1998,[278] or exclusion orders under section 46 of the Criminal Justice and Courts Services Act 2000.[279] An indefinite Anti-Social Behaviour Order, forbidding the organizing of any demonstration about animal experimentation, or any contact with Huntingdon Life Sciences, or linked persons or companies, was imposed on Avery and others alongside a nine-year prison sentence for blackmail since no remorse had been shown and future preventative measures were justified. Within the province of civil law, affected companies, traders, or farmers have also resorted to private injunctions.

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[270] DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT, PREVENTING VIOLENT EXTREMISM: NEXT STEPS FOR COMMUNITIES, ¶ 65 (2008).

[271] Individuals such as farmers may also be victims, as with the stealing of the body of Gladys Hammond. Nicola Woolcock, *Animal Rights Grave-Robbers are Jailed for 12 Years Each*, TIMES (London) May 12, 2006, at 37.

[272] *See* HOME OFFICE, *supra* note 62; HOME OFFICE, ANIMAL RIGHTS EXTREMISM: GOVERNMENT STRATEGY (2001).

[273] The concept of breach of the peace in this context was upheld in *Steel v. United Kingdom*, App. No. 24838/94, 1998-VII Eur. Ct. H.R. 95.

[274] Public Order Act 1986, c.64 (U.K.).

[275] Malicious Communications Act 1988, c.27 (U.K.).

[276] Protection from Harassment Act 1997, c.40 (U.K.); *see* AGC Chems. Eur. Ltd. v. Stop Huntingdon Animal Cruelty, [2010] EWHC (QB) B10, 154(24) S.J.L.B. 37, *available at* http://www.bailii.org/ew/cases/EWHC/QB/2010/B10.html; Smithkline Beecham Plc. v. Avery, [2007] EWHC (QB) 948, [2009] EWHC (QB) 1488; Green v. DB Group Servs. (UK) Ltd., [2006] EWHC (QB) 1898, [2006] I.R.L.R. 764; Oxford Univ. v. Webb, [2006] EWHC (QB) 2490; Hall v. Save Newchurch Guinea Pigs, [2005] EWHC 372 (QB), 102(21) L.S.G. 33; Chiron Corp. Ltd. v. Avery, [2004] EWHC (QB) 493; Emerson Devs. Ltd. v. Avery, [2004] EWHC (QB) 194; Huntingdon Life Scis. Group v. Stop Huntingdon Animal Cruelty, [2004] EWHC (QB) 1231; Daiichi U.K. Ltd. v. Stop Huntingdon Animal Cruelty, [2003] EWHC (QB) 2337, [2004] 1 W.L.R. 1503; Silverton v. Gravett, [2001] EWHC (QB) 282; Univ. of Oxford v. Broughton, [2006] EWCA (Civ) 1305, (2006) 150 S.J.L.B. 1110, [2008] EWHC (QB) 75.

[277] R v. Avery, [2009] EWCA (Crim) 2670.

[278] Crime and Disorder Act 1998, c.37 (U.K.).

Amongst the more specialist laws are sections 68 and 69 of the Criminal Justice and Public Order Act 1994,[280] which establishes the concept of aggravated trespass.[281] By section 42 of the Criminal Justice and Police Act 2001, the police are given broad powers to direct protestors away from the residence of another where it is reasonably believed that the presence of the protestors amounts to harassment or is likely to cause alarm or distress.

The Serious Organised Crime and Police Act 2005[282] adds offenses involving interference with contractual relationships so as to harm animal research organizations (section 145) and the intimidation of persons concerned with animal research organizations (section 146). The latter are very broadly constituted in that they can be committed via the infliction or threat of an act amounting to any criminal offense or any tortious act causing loss or damage of any description.[283] In *R v. Harris*,[284] the defendant pleaded guilty to three offenses under section 145, involving criminal damage amounting to £29,000, such as slashing vehicle tires and gluing locks of companies that had traded with Huntingdon Life Sciences but were intimidated to desist. Concurrent sentences of two years' imprisonment were imposed. A similar level of offending under section 145 was dealt with in the *Attorney-General's Reference No. 113 of 2007*.[285] The offender pleaded guilty to six counts of blackmail, one count of attempted blackmail and five counts under section 145. Over a period of five years, she sent threatening messages to employees of a bank who provided financial services to Huntingdon Life Sciences, to a veterinary surgeon who provided services to a family that bred guinea-pigs for medical research, to the owner of a company that carried out maintenance work for an organization involved in animal research, and to another company. Some of the threats were by letters, which contained white powder, and one recipient was taken to hospital for decontamination. The offender, who had acted alone, had been sentenced to eight months' imprisonment, which was viewed by the Court of Appeal as unduly lenient. The Court considered that the starting point was six years. Aggravating factors were that she conducted a sustained campaign, that she gave the impression of acting on behalf of an organized and dangerous group, and that she sent unidentified powder (akin to anthrax). Two years' imprisonment was substituted.

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[279] Criminal Justice and Courts Services Act 2000, c.43 (U.K.).

[280] Criminal Justice and Public Order Act 1994, c.33 (U.K.).

[281] *See* TOM BUCKE & ZOE JAMES, HOME OFFICE, TRESPASS AND PROTEST: POLICING UNDER THE CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994 190 (1998).

[282] Serious Organised Crime and Police Act 2005, c.15 (U.K.).

[283] See the criticisms as to necessity and certainty in JOINT COMMITTEE ON HUMAN RIGHTS, SCRUTINY: SEVENTH PROGRESS REPORT, 2004-05, H.L. 97, H.C. 496, at ¶¶ 2.3-2.7.

[284] [2006] EWCA (Crim) 3303, [2007] 2 Cr. App. R. (S.) 37.

Corporate law has also been amended. The Criminal Justice and Police Act 2001, section 45, allows for "confidentiality orders" to be issued by the Secretary of State (for Trade and Industry) relating to the addresses of company officers on grounds of serious risk of violence and intimidation. Next, following the sending of letters to shareholders of GlaxoSmithKline in 2006, asking them to ensure disinvestment from Huntingdon Life Sciences, the company obtained an injunction against "persons unknown."[286] The government then moved to restrict access to shareholder identities. So, under the Companies Act 2006,[287] section 116(3), any request for shareholder information must be accompanied by an explanation of purpose. If the company declines to grant the request, it may apply for court review. Next, by section 240, persons becoming directors can request, without proof of serious risk, that their home addresses be kept on a separate list to which access will be restricted.[288] Third, information about persons with whom the company has business arrangements can be withheld under section 417 so as to avoid, in the opinion of the directors, serious prejudice.

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[285] [2008] EWCA (Crim) 22, [2008] 2 Cr. App. R. (S.) 22.

[286] *GSK gets Order Against Activists*, TIMES (London), May 10, 2006, at 44; *see also* Pelling v. Families Need Fathers Ltd., [2001] EWCA (Civ) 1280.

[287] Companies Act 2006, c.46 (U.K.).

This mixture of criminal law and civil law responses against animal welfare extremists raises the question of whether a more subtle range of measures than those created under the Terrorism Act 2006 could be used against the practitioners of militant speech in favor of terrorism. The avoidance of proscription and offenses based on speech content may also make it a more appealing and constitutionally palatable model for other militant democracies, such as the United States. Indeed, there is evidence of such an approach already being followed in that jurisdiction. Thus, the Animal Enterprise Protection Act of 1992 and Animal Enterprise Terrorism Act of 2006 have promulgated in the United States an offense of causing disruption or damage to an animal enterprise, with enhanced penalties based on the level of economic damage and restitution orders, but subject to a saving for expressive conduct.[289] This offense was upheld as constitutional in the "SHAC-7" case of *United States v. Fullmer*[290] because of either the imminence of electronic attacks on the enterprises or the "true threat" against individual officers. The confinement to animal enterprises has meant that more general offenses, such as conspiracy to damage, must be raised against "eco-terrorism."[291] Civil injunctions have also been used by Huntingdon Life Sciences and related enterprises against the American branches of their opponents.[292]

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[288] *See also* The Companies (Disclosure of Address) Regulations 2009, S.I. 2009/214 (U.K.).

[289] Pub. L. No. 102-346; Pub. L. No. 109-374; 18 U.S.C. § 43 (2009); *see also* Jared S. Goodman, *Shielding Corporate Interests from Public Dissent: An Examination of the Undesirability and Unconstitutionality of "Eco-Terrorism" Legislation*, 16 J.L. & POL'Y 823 (2008).

[290] 584 F.3d 132 (3d Cir. 2009); *see* SHAC-7 HOMEPAGE, http://www.shac7.com (last visited Mar. 11, 2011).

[291] *See* United States v. McDavid, No. 2:06-cr-00035-MCE, 2008 WL 850307 (E.D. Cal. Mar. 28, 2008); Will Potter, *The Green Scare*, 33 VT. L. REV. 671; *see also* GREEN IS THE NEW RED, http://www.greenisthenewred.com (last visited Mar. 11, 2011).

Another reason for emulation is the prospect of an impact that is more than symbolic. The Association of the British Pharmaceutical Industry (ABPI) reports a substantial decline in attacks and intimidation by animal extremists in the United Kingdom since the peak years of 2003 and 2004.[293] The ABPI contends that civil injunctions and anti-harassment legislation have secured this impact, though its conclusion also relies upon the further factor of improved local policing (bolstered by extra central funding).[294] A full assessment would also point to national policing improvements. The National Extremism Tactical Coordination Unit (NETCU)[295] provides tactical advice to businesses. The National Public Order Intelligence Unit[296] gathers and collates intelligence for policing purposes, while the National Domestic Extremism Team[297] helps with investigations. All are headed by the National Coordinator for Domestic Extremism (within the NETCU) who reports to the Association of Chief Police Officer's Terrorism and Allied Matters

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[292] *See* Huntingdon Life Scis., Inc. v. Rokke, 986 F. Supp. 982 (E.D. Va. 1997); Huntingdon Life Scis., Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., 29 Cal. Rptr. 3d. 521 (Cal. Ct. App. 2005); City of Los Angeles v. Animal Def. League, 37 Cal. Rptr. 3d. 632 (Cal. Ct. App. 2006); SmithKline Beecham Corp. v. Stop Huntingdon Animal Cruelty USA, 959 A.2d 352 (Pa. Super. Ct. 2008).

[293] ASS'N OF THE BRITISH PHARM. INDUS. HOMEPAGE, http://www.abpi.org.uk (last visited Mar. 11, 2011). But there remained 70 instances of damage (146 in 2003; 177 in 2004) and 10 "home visits" (compared to 259 and 179).

[294] *See* JOINT COMMITTEE ON HUMAN RIGHTS, DEMONSTRATING RESPECT FOR RIGHTS? FOLLOW-UP, REPORT, 2008-09, H.L. 141, H.C. 522; Mem. submitted by the Ass'n of the British Pharm. Indus., http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/47we14.htm.

[295] NATIONAL EXTREMISM TACTICAL COORDINATION UNIT HOMEPAGE, http://www.netcu.org.uk (last visited Mar. 11, 2011).

[296] *The National Public Order Intelligence*, ASSOCIATION OF CHIEF POLICE OFFICERS, http://www.acpo.police.uk/NationalPolicing/NCDENationalCoordinatorDomesticExtremism/TheNationalPublicOrderIntelligenceUnitNPOIU.aspx (last visited Mar. 11, 2011); *see* 449 PARL. DEB., H.C. (6th ser.) (2009) 339w.

[297] *National Domestic Extremism Team*, ASSOCIATION OF CHIEF POLICE OFFICERS, http://www.acpo.police.uk/NationalPolicing/NCDENationalCoordinatorDomesticExtremism/NationalDomesticExtremismTeamNDET.aspx (last visited Mar. 11, 2011).

Committee.[298] However, despite all these changes, the most targeted company, Huntingdon Life Sciences, still complains that "insufficient consideration was given to counter-terrorism powers in what was widely considered in practice (but not in name) to be domestic terrorism."[299]

Can this record of relative success be replicated using the same techniques against militant speech about terrorism? Arguably, it is easier to fashion and apply more limited responses to animal extremists. Their techniques are less dangerous since they more often than not target property not persons, and they appear to have clear fixations (above all, Huntingdon Life Sciences), which make the work of law enforcement much more predictable. Furthermore, their targets are primarily in the private sector rather than the public sector or the public itself. This difference inevitably has the effect of reducing the interest in symbolic condemnation through criminal justice. Nevertheless, the panoply of refined offenses plus civil law restraint is worthy of further consideration in the terrorism field. Civil law is playing an increasing role against terrorism as a way of empowering victims,[300] and perhaps the state should see it as a weapon for shaping behavior that might encourage terrorism beyond just the financial arena.

CONCLUSIONS

The anti-terrorism legislation reflects long-standing notions of "militant democracy" in which a state based on legitimate foundations should be ready and willing to confront opponents who abuse its tolerance. However, even when this stance of state militancy is legitimate, consideration should be given as to whether, on a rights audit, less intrusive measures than associational or speech crimes would better distinguish the legitimacy of extreme speech which, for example, seeks the overthrow of the existing constitutional order and the illegitimate propagation of violence as the means to achieve it. The expanded basis for proscription and the added offenses in the Terrorism Act 2006 and most aspects of its application can probably be justified in terms of the relativist rights discourse of the European Convention. At the same time, the breadth of the definition of terrorism, including its extra-territorial application, compounds the dangerous latitude of these measures. These criticisms do not imply that extreme speech and associations should be tolerated, but they do emphasize that the main retort in a liberal democracy must be engagement. The "Prevent" strategies of CONTEST have latterly opened a new front which commendably seeks dialogue, and there may also be value in turning to civil law responses, as is often the inclination with animal extremists, instead of the blunter criminal law. Nevertheless, recent developments do firmly confirm that the tolerance of militant speech is on the wane, and that risk and offense aversion are driving new legislation. That trend is occurring within the United Kingdom, but it is also a regional and international movement, as represented by the United Nations Security Council Resolution 1624 and the reformulation of the EU Framework Decision on Combating Terrorism. As far as the United Kingdom state is concerned, there is some evidence from the modest statistics on enforcement to suggest that it is not just militant but smartly militant and appreciates that the prime message being conveyed is symbolic. However, the dangers remain both that chance events and provocations will prompt precipitate action against expressive and associational rights within the United Kingdom (as with Islam 4 UK) and that the United Kingdom will further foist its favored mechanisms onto other countries which have far less capacity for accountability or tradition of respect for individual rights.

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[298] *NCDE National Co-ordinator Domestic Extremism*, ASSOCIATION OF CHIEF POLICE OFFICERS, http://www.acpo.police.uk/NationalPolicing/NCDENationalCoordinatorDomesticExtremism/Default.aspx (last visited Feb. 10, 2011).

[299] *See* JOINT COMMITTEE ON HUMAN RIGHTS, DEMONSTRATING RESPECT FOR RIGHTS? FOLLOW-UP, REPORT, 2008-09, H.L. 141, H.C. 522; Mem. submitted by Huntingdon Life Scis., http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/47we36.htm.

[300] *See* Murphy v. Lord Chancellor, [2007] NIQB 46, *available at* http://www.bailii.org/ew/cases/EWHC/QB/2010/B10.html; Debra M. Strauss, *Reaching out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*, 19 DUKE J. COMP. & INT'L L. 307 (2008).

ENTRAPMENT AND EQUALITY IN TERRORISM PROSECUTIONS: A COMPARATIVE EXAMINATION OF NORTH AMERICAN AND EUROPEAN APPROACHES

Kent Roach[*]

INTRODUCTION

The entrapment defense is no longer peculiarly American. It has been recognized in England and Wales,[1] Canada,[2] and by the European Court of Human Rights.[3] Comparative analysis should be illuminating because entrapment implicates broader questions about the purposes of criminal justice and the respective importance of punishing the guilty and ensuring that the state does not use excessive and unfair methods to prosecute crime. It may also raise questions about attitudes in different countries towards specific crimes, regulation of police behavior, and random virtue-testing in the absence of individualized suspicion.

Commentators are starting to recognize that the entrapment defense will play a role in some terrorism prosecutions. Proactive terrorism investigations follow naturally from the preventive orientation of modern anti-terrorism laws. Terrorism offenses relating to the provision of material support or membership or participation in terrorist groups invite proactive policing where state actors or informers attempt to infiltrate groups of suspected terrorists and provide them with opportunities or more robust inducements to commit the broad array of new terrorist crimes.

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[*] Professor of Law and Prichard-Wilson Chair in Law and Public Policy, University of Toronto. I thank Russell Weaver, the Faculty of Law at the University of Aix-en-Provence and the participants at the Criminal Procedure symposium held there in June 2010 where an earlier version of this paper was presented. I also acknowledge the assistance of Owen Goddard a research assistant at the University of Toronto Faculty of Law and of Canada's Social Sciences and Humanities Research Council.

[1] R v. Loosely, [2001] UKHL 53 (Eng.).

[2] R v. Mack, [1988] 2 S.C.R. 903 (Can.).

[3] Teixeira de Castro v. Portugal, 28 Eur. Ct. H.R. 101 (1999).

Much of the limited commentary on terrorism and entrapment has focused on the implications of the State's greater interests in prosecuting terrorism as opposed to drugs or financial crimes that are often the focus of government stings.[4] The implications of such arguments are that courts will be more lenient towards the State when they are investigating terrorist crimes. Although it is undeniable that state interests are particularly compelling in the terrorism context, I will suggest that the protection of equality values, and in particular the avoidance of reasonable claims that the State has targeted young Muslim men for discriminatory reasons based on their religious and political views, should also be an important contextual factor when applying the entrapment defense in terrorism prosecutions.

Courts should still determine whether the State has acted excessively in inducing the commission of terrorist crimes, but the State's compelling interests in preventing and prosecuting terrorism will likely allow it to use more intrusive and intensive stings than used in drug or prostitution cases. On the other hand, entrapment doctrine can and should evaluate the initial targeting decision of the police and when appropriate provide a remedy for targeting decisions that are based on discriminatory and stereotypical assumptions as opposed to reasonable suspicion that the targets are or are likely to be involved in terrorist activity.[5]

Terrorism frequently raises concerns about equality and non-discrimination. Today, terrorism prosecutions mainly involve Muslim accused. At other times and in other places, terrorism prosecutions were focused on other minorities. Terrorism is motivated by extremist political and religious views and one of the great virtues of the criminal law is its ability to denounce violence and planning for violence regardless of the accused's motive.[6] The ability of the criminal law to denounce terrorism, however, can be diluted by claims that the State targeted the accused simply because of the accused's political or religious views and then created a crime that would not have occurred absent the State's discriminatory targeting choice. The breadth of crimes related to terrorism and their possible application to activities that involve freedom of speech, religion, and association[7] makes it particularly important that the criminality and culpability of terrorism be maintained. A successful entrapment defense can turn terrorism from a serious crime that threatens collective security and innocent civilians into a divisive political or religious crime created by the State.

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[4] Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125 (2008); Jon Sherman, *"A Person Otherwise Innocent": Policing Entrapment in Preventative, Undercover Counterterrorism Investigations*, 11 U. PA. J. CONST. L. 1475 (2009) [hereinafter *Counterterrorism Investigations*].

[5] David Ormerod & Andrew Roberts, *The Trouble with* Teixeira*: Developing a Principled Approach to Entrapment*, 6 INT'L J. EVIDENCE & PROOF 38, 47-48 (2002); ANDREW ASHWORTH & MIKE REDMAYNE, THE CRIMINAL PROCESS 261-62 (3d ed. 2005).

Claims of religious and other forms of discriminatory profiling are already being made in the terrorism context and they should be taken seriously.[8] They suggest that more attention should be paid to how entrapment doctrine affects the original decision to target the accused. In order to rebut allegations of discriminatory profiling, courts should insist on individualized reasonable suspicion or pre-existing disposition to commit a crime. Courts should be cautious about existing doctrines that allow people to be targeted because of their associations with others or their presence at a location associated with a particular crime.

The need for a focus on the front-end targeting decision is also supported by the likelihood that courts will allow state agents in terrorism stings more latitude when attempting to induce or facilitate a terrorist crime than they might allow them with respect to the so-called victimless offenses of drugs and prostitution. If courts are going to allow intense and prolonged stings in terrorism cases, they should at least make sure that there are proper grounds for subjecting individuals to such intrusive stings.

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[6] Kent Roach, *The Criminal Law and Terrorism*, *in* GLOBAL ANTI-TERRORISM LAW AND POLICY 129, 141 (Victor Ramraj, Michael Hor, & Kent Roach eds., 2005). On the values of a criminal law approach to terrorism see also KENT ROACH, THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM (forthcoming, 2011).

[7] Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

[8] Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687 (2010); Eric Schmitt & Charlie Savage, *In U.S. Sting Operations, Questions of Entrapment*, N.Y. TIMES, Nov. 29, 2010, http://www.nytimes.com/2010/11/30/us/politics/30fbi.html?_r=3&hp=&pagewanted=all; Jerry Markon, *Mosque infiltration feeds Muslims' distrust of FBI*, WASH. POST, Dec. 5, 2010, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/04/AR2010120403720.html.

In the first part of this paper, I will briefly review the leading entrapment decisions in the American federal system where most terrorism prosecutions take place, in Canada, in England and in the European Court of Human Rights. Different approaches are taken in these jurisdictions ranging from the American federal focus on whether the accused was predisposed to commit the crime to more objective approaches in Canada and England that are built around the court's ability to prevent an abuse of the judicial process. The European Court of Human Rights' approach is also based on objective concerns about a fair trial and not the subjective pre-disposition of the accused. In addition, it seems to place especially stringent limits on proactive stings in part because a finding of entrapment in that court is not tied to the drastic remedy of an acquittal or a stay of proceedings.

In the second part of this paper, I will evaluate the ability of different approaches to entrapment to detect and disapprove of discriminatory targeting of the accused in terrorism investigations. I will suggest that all the entrapment defenses to various degrees allow the accused to argue that they are the victims of a discriminatory targeting decision. There is, however, a danger under American federal law that the targeting decision will be unregulated when courts conclude that the State has not offered the accused an inducement to commit the crime. There is also a possibility under English and Canadian law that authorities can justify intensive stings not on the basis of individualized suspicion but on the basis of an individual's attendance at political and religious gatherings and locations suspected of involvement with terrorism. The European Court of Human Rights, however, seems to insist on individualized reasonable suspicion and as such provides the most direct response to claims of discriminatory targeting of the accused.

In the third part of this paper, I will explore the future evolution of entrapment defenses in light of the possible impact of terrorism cases. The European Court of Human Rights may have to re-think its apparent aversion to proactive stings in light of the seriousness of terrorism. Nevertheless, its requirement for reasonable suspicion and full disclosure of the State's basis for targeting the accused is admirable and should be retained. Courts in England and Canada will have to be careful about allowing individuals in locations associated with religious or political radicalism to be targeted in the absence of reasonable and individualized suspicion. They should not condone discriminatory profiling or vendettas against certain religious and political groups. The much maligned subjective American approach may be able to rebut claims of discriminatory targeting by requiring proof that the accused was predisposed to commit terrorism crimes before he or she was subjected to a long and elaborate sting using informers or undercover officers. At the same time, there are concerns that American juries have been reluctant to apply the entrapment defense in terrorism cases, whereas Anglo-Canadian and European entrapment doctrine will be applied by judges who must provide reasons for their decisions.

Although courts in all countries will likely make allowances for terrorism and allow more intensive stings, they should also insist that the State establish either individualized reasonable suspicion or subjective predisposition to commit terrorist crimes. Such findings can rebut claims of discriminatory targeting and they affirm individual culpability for terrorist crimes that is independent of the accused's religious or political views or associations.

I. THE BASIC STRUCTURE OF ENTRAPMENT DEFENSES

The entrapment defense has generated much commentary in large part because of the variety of different entrapment defenses. Distinctions have traditionally been drawn between the subjective approach with its focus on whether the accused was pre-disposed to commit the crime and objective approaches which focus more on the propriety of the State's actions. As will be seen, the actual tests are more complex than the stark subjective/objective dichotomy.

A. The American Federal System

The leading entrapment case in the American federal system is *Jacobson v. United States*[9] where the United States Supreme Court held that entrapment had been made out because the government, over a twenty-six month period, induced the accused to commit a child pornography offense, but was unable to prove beyond a reasonable doubt that the accused "was disposed to commit the criminal act prior to first being approached by Government agents."[10] The Court stressed that the accused's predisposition to commit the crime must be established before the government intervened. In this case, there was some evidence that the accused was interested in child pornography before the sting commenced, but for his own personal use and at a time when possession was legal. The Court also indicated that predisposition will usually be established when the accused readily commits the crime after having been offered an opportunity to do so.

Since *Sorrells v. United States*, there has been a long debate in the United States Supreme Court about whether a subjective or objective approach to entrapment is preferable.[11] In *Sherman v. United States*, Chief Justice Warren for the majority upheld the subjective approach and expressed concern about informers and government agents who play "on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this."[12] Justice Frankfurter dissented with three others and warned of the dangers that a subjective approach would put the accused's past on trial and avoid determining whether the State's behavior fell below acceptable standards regardless of the status of the accused.

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[9] 503 U.S. 540 (1992).

[10] *Id.* at 549 (citing United States v. Whoie, 925 F.2d 1481, 1483-84 (D.C. Cir. 1991)).

[11] 287 U.S. 435 (1932).

[12] 356 U.S. 369, 376 (1958) (footnote omitted).

B. Canada

The leading Canadian case on entrapment is *Regina v. Mack*.[13] In that case, the Supreme Court held that the entrapment defense was grounded in concerns about the court's ability to protect its own processes from abuse. The Court explicitly adopted an objective approach that focused on the acceptability of the State's conduct when it induced the commission of the crime and not on the accused's predisposition to commit the crime. In this sense, the Canadian court explicitly sided with those dissenters on the American court who raised concerns that a subjective standard would avoid the central question of the acceptability of the State's behavior.[14]

The objective approach placed somewhat greater burdens on the accused than the American subjective approach. The accused under *Mack* would have to establish entrapment on a balance of probabilities and would not benefit if there was a reasonable doubt that there was entrapment including whether he or she was predisposed to commit the crime. The remedy for entrapment is a permanent stay of proceedings in order to protect the administration of justice from disrepute.

Finally, the entrapment defense in Canada is generally litigated after the accused has been convicted on the merits and it is the judge and not the jury who decides whether the entrapment defense has been established. This approach recognizes the objective nature of the defense and requires judicial reasons for decisions whether to accept or reject the entrapment defense. At the same time, litigating entrapment after a verdict makes clear to judges the crime control costs of finding that the accused has established entrapment.

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[13] [1988] CarswellBC 701 (Can.) (WL), [1988] 2 S.C.R. 903.

[14] Justice Lamer observed:

> [A]n American court following the subjective approach will convict a predisposed accused even if the police conduct was particularly offensive unless, perhaps, it was so outrageous as to trigger a due process defense. It is my view that it would bring the administration of justice into dis repute [sic] to permit a conviction in those circumstances and the goal of preserving respect for the courts would be undermined. . . . given that the focus is not the accused's state of mind but rather the conduct of the police, I think it is sufficient for the accused to demonstrate that, viewed objectively, the police conduct is improper. To justify police entrapment techniques on the ground that they were directed at a predisposed individual is to permit unequal treatment. I gratefully adopt the criticisms espoused in the minority and dissenting opinions of the judgments of the United States Supreme Court discussed earlier, which have convinced me of the fundamental inequality inherent in an approach that measures the permissibility of entrapment by reference to the predisposition of the accused.

Id. at paras. 97, 113.

Although the Canadian test is an objective one when focusing on whether the State unacceptably induced the commission of an offense, it also has a separate and preliminary test that governs the State's decision to target the accused and provide him or her with an opportunity to commit a crime. This threshold test is that the State must either have a reasonable suspicion that the accused was involved in criminal activity or that the State was acting in pursuit of a bona fide inquiry into specified crimes usually in a specified area. The Canadian Court has so far been relatively deferential to the State at this preliminary targeting stage. Unlike the United States Supreme Court in *Sherman*, the Canadian Supreme Court has held that prior drugs convictions were enough in *Mack* to provide a reasonable suspicion that justified providing the accused with an opportunity to commit new drug offenses.[15] The Canadian Court also held in *Regina v. Barnes* that random virtue testing in an area of downtown Vancouver known for drugs was a bona fide inquiry.[16] This meant that the undercover officer was allowed to provide anyone found in that area an opportunity to purchase or supply drugs.

C. England

The English courts were even more reluctant than the Canadian courts to recognize an entrapment defense. In the 2001 case of *Loosely*, however, the House of Lords abandoned its reluctance to recognize entrapment as anything more than a mitigating factor in sentencing. Like the Canadian courts, the House of Lords held that entrapment should be a grounds for staying proceedings when necessary to protect the court's process from abuse. Lord Nicholls accepted the critique of the subjective approach offered by the Canadian courts, namely that it could allow the State to offer excessive inducements just because the accused was predisposed to commit a crime. Like the Canadian courts, he also imposed some restrictions on the ability of the State to provide the accused with an opportunity to commit a crime when he stated:

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[15] *Id.* at para. 156.

[16] [1991] 1 S.C.R. 449, para. 17 (Can.).

> It goes without saying that the police must act in good faith and not, for example, as part of a malicious vendetta against an individual or group of individuals. Having reasonable grounds for suspicion is one way good faith may be established, but having grounds for suspicion of a particular individual is not always essential. Sometimes suspicion may be centred on a particular place, such as a particular public house. Sometimes random testing may be the only practicable way of policing a particular trading activity.[17]

Although less formulated than the comparable Canadian test, this preliminary test similarly suggests that the State must either have a reasonable suspicion about a particular target or be conducting a good faith investigation that is justified by the nature of a particular location or of a particular crime. As in Canada, the accused's criminal record could be relevant to establishing a reasonable suspicion, but is not relevant to the question of whether there has been improper inducement of an offense.[18] It will also be argued below that the suggestion that the police must act in good faith and not have a "malicious vendetta"[19] against individuals or groups could be relevant in terrorism cases where discriminatory targeting is alleged.

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[17] R v. Loosely, [2001] UKHL 53, para. 27 (Eng.); *see also* Lord Hoffmann at para. 68 (endorsing the Canadian bona fide inquiry approach).

[18] Lord Nicholls stated:

> The defendant's criminal record is unlikely to be relevant unless it can be linked to other factors grounding reasonable suspicion that the defendant is currently engaged in criminal activity. As Frankfurter J said, past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing repeated convictions, from which the ordinary citizen is protected: see *Sherman v. United States* (1957) 356 US 369, 383.

Id. at para. 29; *see also* para. 68 per Lord Hoffmann.

As with the Canadian test, the secondary English test of whether the State has improperly induced the commission of a crime is based on a consideration of all the circumstances of the particular case with a goal of protecting the integrity of the justice system. At the same time, the English approach does not categorically attempt to exclude the accused's predisposition to commit the crime as a factor when determining whether there has been improper inducement. Lord Nicholls indicated that:

> The greater the inducement held out by the police, and the more forceful or persistent the police overtures, the more readily may a court conclude that the police overstepped the boundary: their conduct might well have brought about commission of a crime by a person who would normally avoid crime of that kind.[20]

Similarly Lord Hutton also stated that courts have and should consider:

> [W]hether a person has been persuaded or pressurised by a law enforcement officer into committing a crime which he would not otherwise have committed, or whether the officer did not go beyond giving the person an opportunity to break the law, when he would have behaved in the same way if some other person had offered him the opportunity to commit a similar crime, and when he freely took advantage of the opportunity presented to him by the officer.[21]

These statements may allow the court to consider predisposition to commit the crime as one factor in deciding whether there has been entrapment whereas the Canadian approach declares such considerations to be out of bounds in order to preserve a purely objective focus on the integrity of the judicial system.

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[19] *Loosely*, [2001] UKHL at para. 27.

[20] *Id.* at para. 28.

[21] *Id.* at para. 101.

D. European Court of Human Rights

The leading European Court of Human Rights case is the 1998 decision in *Teixeira de Castro v. Portugal* where the Court held that entrapment had deprived an accused of the right to a fair trial.[22] After having obtained the name of the accused from another suspect, the police went to the accused's home and expressed a desire to buy heroin. Such conduct would likely not have been objectionable under any of the entrapment defenses examined above, but it was held to be a violation of the right to a fair trial by the European Court of Human Rights. The Court stressed that the officers' actions were not undertaken "as part of an anti-drug-trafficking operation ordered and supervised by a judge."[23] These statements relate to a European concern about the proper regulation of undercover officers that could impose impediments to transnational cooperation with American officials.[24] In the next section, I will explore a different concern, namely that European courts might defer to judicially authorized undercover investigations even if some of the targeting decisions may be questioned.

In a manner consistent with both the threshold Canadian and English concerns about reasonable suspicion, the Court stressed that it "does not appear either that the competent authorities had good reason to suspect that Mr [sic] Teixeira de Castro was a drug trafficker; on the contrary, he had no criminal record and no preliminary investigation concerning him had been opened."[25] This suggests that offering an accused an opportunity to commit a crime in the absence of a reasonable suspicion might result in a finding of a violation of the right to a fair trial. It is also noteworthy that no mention is made of the concept of a bona fide inquiry or good faith investigation into a particular form of crime or high crime location. This again represents a more robust restraint on the State than is found in English or Canadian law.

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[22] Teixeira de Castro v. Portugal, 28 Eur. Ct. H.R. 101 (1998).

[23] *Id.* at para. 38.

[24] Jacqueline E. Ross, *Impediments to Transnational Cooperation in Undercover Policing: A Comparative Study of the United States and Italy*, 52 AM. J. COMP. L. 569 (2004) [hereinafter *Impediments*]; Jacqueline E. Ross, *The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany*, 55 AM. J. COMP. L. 493 (2007) [hereinafter *Covert Surveillance*]. In England, the use of covert human intelligence sources is governed by Part II of the *Regulation of Investigatory Powers Act*, 2000, c. 23 (Eng.), whereas neither the United States nor Canada have a comparable statutory framework.

[25] *Teixeira de Castro*, 28 Eur. Ct. H.R. at para. 38.

The European Court of Human Rights also expressed concerns about the manner in which the officers engaged in the investigation even though the conduct of the officers would not appear to go beyond providing the accused with an opportunity to commit the crime and as such would not be objectionable under American, Canadian or English law. The Court stressed that the officers went beyond investigating the offense in "an essentially passive manner, but exercised an influence such as to incite the commission of the offence."[26] In a literal sense, *Teixeira de Castro* suggests that all active forms of investigation may amount to entrapment. As suggested by some of the judges in *Loosely*, this would be an unrealistic position given wide spread acceptance of active forms of policing. A more realistic reading of the European jurisprudence is that active policing presents a problem when it causes the commission of a crime that would not have been committed without State intervention. This reading of the case allows for a balancing of the competing interests in crime control, fairness to the accused and the integrity of the judicial system. It also suggests that even under the European Convention, the question of the accused's predisposition to commit the offense may be relevant both with respect to whether the State had a reasonable suspicion and also with respect to whether it induced the commission of the offense.

As a supranational court, the European Court of Human Rights in *Teixeira de Castro* did not have the power to reverse a conviction that American, Canadian or English courts recognizing an entrapment defense would have. Instead, the European Court of Human Rights ordered damages for the pecuniary and non-pecuniary damages that the conviction caused to the accused.[27] The issue of remedy is an important one especially in terrorism cases where the State's interest in obtaining a conviction will be great. There is a danger in American, Canadian and English law that the remedial tail may wag the dog and that courts will dilute the entrapment defense to allow terrorism convictions.

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[26] *Id.*

E. Summary

This brief survey of the leading cases on entrapment suggests that the analytical dichotomy between subjective and objective approach can be misleading. To be sure, the American federal approach does ultimately focus on the accused's subjective predisposition to commit the offense, but it also requires that the accused establish that the State induced the commission of the offense by going beyond simply offering an opportunity to commit a crime. The explicitly objective tests used by Canadian and English courts and the European Court of Human Rights contain elements of the subjective by the reference to the need for reasonable suspicion before the State even offers the accused an opportunity to commit the crime. In addition, the English and European courts also recognize that the accused's pre-disposition to commit the crime may be relevant to the determination of whether the State has improperly induced the commission of the crime.

The Canadian courts are clear that the absence of a reasonable suspicion or of a bona fide inquiry will trigger a finding of entrapment and a stay of proceedings even if the State only offers the accused an opportunity to commit the crime. The European Court's approach is noteworthy in its apparent rejection of both active stings, at least without judicial authorization, and of targeting locations as a legitimate alternative to individualized suspicion. At the same time, the European Court's more robust approach to entrapment cannot be fully appreciated without recognizing that it does not provide a victim of entrapment with an acquittal or a stay of proceedings, but with more limited remedies such as damages. It is also relevant that entrapment in the United States is treated as a true defense and that juries make the decision whether the entrapment defense applies whereas in Canada, England and Europe, judges decide whether an entrapment defense has been established in a particular case.

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[27] *Id.* at paras. 46-53.

II. ENTRAPMENT AND CLAIMS OF DISCRIMINATORY TARGETING

A. The American Federal System

As discussed above, the American federal system requires the accused to establish that the State has induced the commission of the crime, but upon such a finding requires the State to prove beyond a reasonable doubt that the accused was predisposed to commit the crime before the State began its inducement. Under this defense, there is some risk that the State's initial targeting decision could be unregulated[28] and motivated by religious, racial or political profiling in cases where the State only provides the accused with an opportunity to commit the offense. In contrast, entrapment may apply in Canada or England in cases where the state actor has not induced the commission of the crime, but has provided the accused with an opportunity to commit the crime in the absence of a reasonable suspicion that the person was involved in crime or in the absence of a good faith investigation of a high crime area or specific location.

The regulation that the entrapment defense provides for State targeting decisions is imperfect and after the fact. Nevertheless, it remains important especially in systems such as the American and Canadian justice systems where stings by the states are not subject to either prior judicial authorization or legislative regulation. There is a danger in the American federal system that random virtue testing of Muslims or others stereotypically associated by the state with terrorism will be allowed and unregulated so long as the state actor does not induce the commission of the crime.

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[28] There is always a potential for an independent equality or discrimination claim, but these are often particularly difficult to establish.

In cases where American courts find that the State induced the commission of an offense, the State will have to rebut claims of discriminatory profiling by proving beyond a reasonable doubt that the accused was predisposed to engage in terrorism crimes before the sting began. If correctly applied by juries, a requirement for such proof of predisposition by the State has the potential to require the police to justify targeting the accused. It can require the State to demonstrate that the accused was predisposed to commit a terrorist crime such as material support or conspiracy and not that the accused simply associated with terrorists or held similarly extreme political or religious views as a terrorist.

One recent terrorism case that has rejected an entrapment claim expressed doubts that the State had even induced the commission of the crime before concluding that the State had demonstrated that the accused was predisposed to have committed the crime.[29] This reveals the danger that the targeting decision could go essentially unregulated if it is held not to be an inducement. Random virtue testing of young Muslims without proof of predisposition to commit terrorist crimes would offend equality or equal protection values and it would chill freedom of speech, association and religion.[30] It could also lend support to those who argue that terrorism crimes are essentially crimes of religious and political extremism.

In response to concerns that targeting decisions may violate equality and freedom of speech and religion, it has been suggested that protected speech should be inadmissible in establishing predisposition.[31] This approach appropriately recognizes constitutional values and avoids the dangers of assuming "a normal person"[32] would be immune to inducements even though inducements may involve appeals to religious and political loyalties and grievances over an extended period of time that may be foreign to an "average" person. Nevertheless, entrapment cases to date have considered protected speech when determining whether the accused was predisposed to commit a crime[33] and it may be unrealistic not to consider speech that provides important evidence of motive and context. The decision in *Holder v. Humanitarian Law Project*[34] also suggests that protected speech can be criminalized when done in association with a listed terrorist group. Given this, it seems inevitable that speech and association will be considered in most terrorism prosecutions. This again points to the importance of the State being able to demonstrate that the accused was subjectively predisposed to commit terrorist crimes before the State initiated its sting.

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[29] United States v. Siraj, 468 F. Supp. 2d 408, 414-16 (E.D.N.Y. 2007), *aff'd*, No. 07-0224-cr, 2008 WL 2675826 (2d Cir. July 9, 2008).

[30] For a recognition of the burden that material support can place on these values see *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

[31] *Counterterrorism Investigations*, *supra* note 4, at 1506.

[32] Stevenson, *supra* note 4, at 144. The Canadian approach also uses an average person approach but takes care to ensure that this person is in the same position as the accused including having the same vulnerabilities as the accused. R v. Mack, [1988] 2 S.C.R. 903, at paras. 126, 133 (Can.).

In cases where the government does induce the commission of a terrorist offense through prolonged stings, the American federal doctrine can provide an indirect but potentially robust remedy for discriminatory targeting decisions. In such cases, the State must prove beyond a reasonable doubt that the accused was predisposed to commit a terrorist crime before the government's involvement in the case. A generic predisposition to extremism or to political and religious views that may condone terrorism should not be enough. This is especially true in the United States which has a strong tradition of not burdening political or religious speech and does not have crimes relating to the indirect advocacy or apologie of terrorism or even membership in a terrorist group. Judge Gershon was sensitive to this danger in *Siraj* when he stressed that the accused's assertion that the government's evidence of his predisposition to commit terrorist acts was for the most part evidence that "[his] particular political point of view . . . [was] incorrect."[35] Rather the evidence related to the accused's own plot to blow up the 34th street subway station in New York City. As such, this evidence satisfied the fairly demanding requirements that predisposition evidence relate to (1) an existing course of criminal conduct similar to the crime charged; or (2) an already formed design to commit the crime charged; or (3) a willingness to perform the crime as witnessed by a ready response to the inducement.[36]

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[33] *Siraj*, 468 F. Supp. 2d at 420.

[34] *Holder*, 130 S. Ct. at 2723.

[35] *Siraj*, 468 F. Supp. 2d at 416.

Proof of the first or second factors listed above will provide the strongest evidence that the government has not manufactured a terrorist crime. The third alternative of a willingness to perform the crime, however, may be more problematic especially if the inducement provided is intense and the intent to commit terrorist violence is less clear than it was in *Siraj*. Here it should be recalled that the Supreme Court in *Jacobson v. United States*[37] indicated that the predisposition to commit the crime should be proven before the government's inducement.

The subjective predisposition to commit the crime requirement should be observed to respond to concerns that the accused may have been induced into terrorist crimes by the State exploiting their religious and political views and sense of loyalty. Properly applied, such an approach could fulfill a similar purpose to a reasonable suspicion requirement that is present in Anglo-Canada entrapment doctrine and has recently been proposed with respect to the use of informers in terrorism cases in the United States.[38] Indeed the subjective predisposition requirement could place even greater restraints on the State than the reasonable suspicion requirement because it should result in an acquittal whenever there is a reasonable doubt that the accused was not inclined to engage in terrorism before the sting started. Such an approach will allow the State to stress that the person should be punished because of their intent to support or conduct acts of terrorist violence and that such intent is independently blameworthy regardless of the political or religious views that may have motivated the accused[39] or the state's actions in inducing the commission of the offense. In this way, entrapment doctrine can enhance the denunciatory value of the criminal law and underline individual culpability for terrorist crimes.

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[36] *Id.* at 415 (citing United States v. Salerno, 66 F.3d 544, 547 (2d Cir. 1995)).

[37] 503 U.S. 540 (1992).

[38] Professor Said has recently proposed the reasonable suspicion requirement for the use of informers. *See* Said, *supra* note 8, at 691. His proposal is appropriately based on constitutional and societal concerns about equality, but is not likely to be implemented unless anchored in existing entrapment doctrine and its requirement for proof of subjective presdisposition to commit the crime.

B. Canada and England

Anglo-Canadian law will address the initial targeting decision by requiring the State to have a reasonable suspicion that the target was involved in similar criminal activity or that the State was acting pursuant to a good faith investigation of a particular crime at a particular location. The standard of reasonable suspicion, like the American predisposition test, is related to the commission of the offense and as such should not be satisfied merely by a showing of religious or political extremism. In drug cases, reasonable suspicion may frequently be established by the existence of prior convictions. In terrorism cases, however, prior convictions will often not be a factor, especially in cases where the suspected terrorists are young and home grown.

Reasonable suspicion in both Canada and England may come from intelligence. In some cases the State may be reluctant to disclose such information thus raising issues of public interest immunity or national security confidentiality. Nevertheless, it will be important for the State to demonstrate reasonable suspicion in order to avoid a stay of proceedings. In Canada in particular, there may be great pressure on the State to disclose this material if the accused raises the entrapment defense after having been found guilty of the terrorist offense. At the same time, the State may attempt to satisfy the reasonable suspicion without reliance on intelligence. Although reasonable suspicion is a lower standard than reasonable and probable grounds, courts should ensure that it relates both to the individual and to the general type of offense. Reasonable suspicion should still be objective and related to the type of crime committed.[40] The subjective hunches or biases of investigating officers even when they are proven by subsequent investigations to have been accurate should not be enough to establish reasonable suspicion.

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[39] The irrelevance of motive has long been recognized in criminal law. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 167 (1878). For arguments that terrorism should not be defined in relation to political or religious motive, see Kent Roach, *The Case for Defining Terrorism With Restraint and Without Reference to Political or Religious Motive*, *in* LAW AND LIBERTY IN THE WAR ON TERROR 39, 39 (Andrew Lynch et al. eds., 2007).

A problematic alternative to reasonable suspicion in both Canadian and English law is for the State to argue that it was conducting a bona fide or good faith investigation into a particular crime or place even though it did not have reasonable suspicion about the targeted individuals. The leading case in Canada is *Regina v. Barnes*[41] where the Supreme Court held that an undercover officer, who acted on a hunch that fell below reasonable suspicion in approaching a young man in an area of downtown Vancouver known for drugs, was nevertheless acting in a bona fide inquiry by investigating drug offenses known to occur in the area. Similarly, the House of Lords in *Loosely* made clear that the State sometimes could use random methods to investigate particular crimes or to target high crime areas.

The State may be tempted to rely on the concepts of bona fide inquiries or good faith investigations in terrorism cases.[42] This arm of the entrapment doctrine could potentially allow them to target anyone found at a location associated with terrorism or perhaps even political or religious radicalism. There are cases in Canada where findings that the police had targeted an area known for illegal drugs effectively precluded any examination of whether the police targeted an individual within that area because he was African-Canadian.[43] Thus, the bona fide inquiry alternative to reasonable suspicion may mask and legitimize discriminatory targeting of individuals for what may be prolonged stings. In other words, the State may act on the stereotyped assumption that anyone found at a particular mosque or political meeting is a possible terrorist. Relying on a bona fide inquiry approach in a terrorism case may also allow the State to disclose less sensitive material from informers and intelligence agencies if all that has to be established is a reasonable concern about terrorism in a particular location as opposed to reasonable suspicion about particular individuals.

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[40] One issue here will be the breadth of terrorist offenses. An intrusive sting might be started on the basis of concerns that the suspect might be willing to engage in a bombing but conclude with the suspect agreeing to commit a less serious terrorist crime such as financing of terrorism.

[41] [1991] 1 S.C.R. 449 (Can.).

[42] ARVINDER SAMBEI, ANTON DU PLESSIS & MARTIN POLAINE, COUNTER-TERRORISM LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK ¶ 4.261 (2009) ("for the time being and on the basis of the speeches in *Loosely*, suspicion as to location is clearly enough").

[43] R v. Sterling, [2004] CarswellOnt 3319 (Can. Ont. Sup. Ct. J.) (WL), 23 C.R. (6th) 54.

In my view, Canadian and English courts should be cautious when applying the bona fide inquiry arm of their entrapment defenses because of concerns about condoning discriminatory forms of profiling and targeting of political or religious radicalism. A bona fide inquiry aimed at a mosque or a group that meets for political or religious purposes implicates the values of freedom of association, expression and religion as well as freedom from discrimination. Although these values do not make a person immune from a terrorism investigation, they should be considered in assessing whether the State has acted improperly in a manner that triggers the court's concern about abuse of process. The administration of justice can be brought into disrepute by discriminatory targeting and random virtue testing of members of religious or racial minorities. *Loosely* may be helpful in this regard because it recognizes that a "malicious vendetta" against an individual or a group would be improper.[44] The targeting of those associated with an extremist mosque or Imam could in some circumstances be the result of an improper vendetta especially when the location is targeted more because of political and religious extremism than reasonable suspicions of involvement with terrorism.

Random virtue testing in terrorism investigations will generally be more objectionable than random virtue testing of people who are located in high crime areas that are associated with drugs or prostitution for several reasons. First, terrorist stings will often be much longer and intense than typical random virtue testing in drug or prostitution cases. The random virtue testing in the Canadian drug case *Barnes* took a matter of minutes whereas a terrorist sting will often take months and even years.

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[44] R v. Loosely, [2001] UKHL 53, at para. 27.

Second, terrorist stings will often involve state agents engaging the target in political and religious discussions. Such discussions implicate fundamental freedoms and may also support claims that the person was targeted because of their political or religious beliefs. Proactive State conduct that implicates such values can be even more objectionable than passive surveillance.

Ideally, reasonable suspicion that the target was involved in a terrorist crime would be established in all cases before a sting was undertaken. At a minimum, Canadian and English courts should insist on strong evidence that a particular location is associated with terrorism, not just political or religious extremism. Even if a bona fide inquiry is established, courts should be sensitive to discriminatory targeting and leading political or religious discussions when determining whether the State has induced the crime. At the end of the day, it is in the State's interest to be able to demonstrate the criminality and culpability of those prosecuted for terrorism crimes. State creation of terrorist crimes is not in society's interests because it will undermine the denunciatory value of punishing real terrorism in cases where the accused had a subjective predisposition to commit terrorist crimes or the state had a reasonable suspicion before the sting that the accused was involved in illegal terrorist activity.

C. European Court of Human Rights

The approach of the European Court of Human Rights also has some potential to respond to the dangers of discriminatory targeting. In *Teixeira de Castro*, the Court noted that there was no reasonable suspicion that the accused was involved in drugs. It also made no reference to the targeting of high crime locations as an alternative to reasonable suspicion.[45] Thus, there should be entrapment resulting in an unfair trial under the European Convention on Human Rights in cases where an individual is targeted without reasonable suspicion that they were engaged in terrorist activity.

The Court's concern with the investigation in *Teixeira de Castro* seemed to be that the investigation had not been properly supervised by a judge.[46] There is thus some danger that the Court may defer to a regularly constituted terrorism investigation even if it includes those who may simply be associates of the prime target. This is a particular concern in countries such as France where investigating prosecutors and judges in terrorism cases work closely with intelligence agencies. Such investigating judges may be influenced by an intelligence mindset that may focus on locations and a person's associations and ideology more than whether there is a reasonable suspicion that the person is involved in crime.[47] Strategic and unsourced intelligence about groups and locations may not establish reasonable suspicion about individuals.[48]

In other contexts, however, the European Court of Human Rights has been sensitive to the dangers of discriminatory targeting in terrorism investigations. In its recent decision in *Gillan v. United Kingdom* which involved stop and search powers under the Terrorism Act 2000, it found that the interference with private life inherent in random stops and searches was not in accordance with law even though they were authorized by senior officials and subject to judicial review. It stated:

> In the Court's view, there is a clear risk of arbitrariness in the grant of such a broad discretion to the police of-

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[45] Teixeira de Castro v. Portugal, 28 Eur. Ct. H.R. 101, paras. 37-39 (1999).

[46] *Id.*

[47] For arguments about the differences between an evidential focus on individual actions and guilt and an intelligence focus on a person's associations, and potential to be a security threat, see Kent Roach, *The Eroding Distinction Between Intelligence and Evidence in Terrorism Investigations*, *in* COUNTER-TERRORISM AND BEYOND 48, 49 (Nicola McGarrity et al. eds., 2010).

[48] Intelligence used by investigating prosecutors or judges may not be sourced and obtained in circumstances that cast doubt on its reliability. HUMAN RIGHTS WATCH, PREEMPTING JUSTICE: COUNTERTERRORISM LAWS AND PROCEDURES IN FRANCE 33 (2008).

> ficer. While the present cases do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration . . . . The available statistics show that black and Asian persons are disproportionately affected by the powers, although the Independent Reviewer has also noted, in his most recent report, that there has also been a practice of stopping and searching white people purely to produce greater racial balance in the statistics.[49]

The scheme that was held to violate Article 8 of the European Convention in *Gillan* did provide for some internal controls in the form of approvals by senior officers and the Secretary of State, but the Court still found that there was a risk of arbitrariness. This decision suggests that the European concern with procedural regularity can be combined with a concern about discriminatory targeting. At the same time, *Gillan* might be distinguished in the entrapment context if judicial officials as opposed to senior police officers authorize investigations.

Targeting decisions in terrorism cases may frequently be informed by intelligence. As discussed above, states may be reluctant to disclose such intelligence even in order to establish that they had a reasonable suspicion to justify offering targets an opportunity to commit terrorism offenses. The European Court of Human Rights 2007 decision in *V. v. Finland*[50] found that the right to a fair trial had been violated in a drug sting case on the basis that the accused had not received full disclosure. This holding made it unnecessary for the Court to determine whether the sting constituted improper instigation of an offense under *Teixeira de Castro.* At the same time, the Court recognized that the accused's right to disclosure was not absolute. It will be interesting to see if the Court is more receptive to the State's interests in secrecy in terrorism investigations. Nevertheless the Court's approach suggests that entrapment issues will likely be viewed by the European Court of Human

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[49] Gillan v. United Kingdom, [2009] Eur. Ct. H.R. 28, para. 85.

[50] [2007] Eur. Ct. H.R. 40412/98.

Rights through a more holistic focus on fair trial rights. The accused will at least prima facie have a right to disclosure of material that will be relevant to determining the reasonableness of the State's targeting decision. State investigators would be well advised to think through how they will demonstrate reasonable suspicion in court before they undertake a complex terrorist sting.

D. Summary

Although the entrapment defenses examined above differ, they all provide some opportunities for accused to argue that they were targeted in a discriminatory manner. The European Court of Human Rights seems to require reasonable suspicion for proactive stings, but there is a danger that judicial authorization may be enough. Judicial authorization of proactive investigations may be informed by intelligence and not always be based on reasonable suspicion about individuals. The grounds for targeting a person may not even be disclosed to the accused for reasons relating to national security.

In the federal United States system, the accused can argue that the State has failed to prove that the accused had a preexisting predisposition to commit a terrorist crime, but there is some danger that discriminatory targeting may be condoned in cases where the State simply provides the accused an opportunity to commit the crime.

In the Canadian and English systems, the accused can argue that they were targeted in the absence of reasonable suspicion that they were involved in terrorism activities and that such targeting merits a stay of proceedings. In both jurisdictions, however, the State can argue that even if there was no reasonable suspicion, it was acting in good faith in conducting an investigation that focused on a particular location or particular crime. Courts should carefully evaluate such claims because of the danger that they could authorize random and intensive virtue testing of people simply because of their religious or political beliefs or attendance at events and places associated with political or religious extremism. All of the entrapment defenses examined in this article allow the accused in varying degrees to challenge discriminatory targeting decisions. Courts and juries should refuse to condone targeting that is based only on religious or political beliefs and opinions and stereotyped assumptions that relate such forms of expression with terrorist violence. It will be particularly important for courts to use the entrapment defense to police targeting decisions if, as suggested in the next section of the paper, the courts will allow the State to conduct intense stings in terrorism investigations.

III. THE FUTURE OF ENTRAPMENT DEFENSES IN TERRORISM OFFENSES

Although entrapment doctrines have the potential to scrutinize the State's reasons for targeting a person in a terrorist investigation, it is also undoubtedly true that such doctrines will be placed under pressure by the important social interests in preventing and prosecuting terrorism. This is particularly so when entrapment constitutes a complete defense to a crime or requires a permanent stay of proceedings as the only remedy for a finding of entrapment. Indeed, the war on terrorism could do much more to weaken the entrapment defense than the war on drugs. In what follows, I will sketch some possible effects that terrorism cases could have on entrapment defenses.

A. The American Federal System

In cases where there is not much evidence of predisposition to commit the offense, there may be a tendency for governments to try to avoid the discriminatory targeting issue by arguing that no inducement actually took place. Because of the seriousness of terrorism offenses, courts may be inclined to hold that governments and informers can conduct fairly elaborate and intense sting operations without reaching the threshold of inducement. Indeed, Judge Gershon in the *Siraj*[51] case appeared willing to conclude that the State had not induced the commission of a terrorist crime before ultimately holding that even if the State had induced the commission of the crime, it had satisfied its burden of proving beyond a reasonable doubt that the accused was predisposed to commit terrorist crimes.

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[51] United States v. Siraj, 468 F. Supp. 2d 408, 408 (E.D.N.Y. 2007).

One weakness of the American defense compared to the Anglo-Canadian defense is that the American subjective defense allows government targeting to be essentially unregulated by the judiciary provided that the government is not found to have induced the commission of the terrorism offense. In this sense, random virtue testing of young Muslims is possible under American entrapment doctrine so long as courts hold that the State has not induced the commission of the offense. In addition, the non-judicial restraints on American stings may not be robust given findings that undercover operations are much less regulated in the United States than in other countries, particularly Europe.[52]

At the same time, the oft-criticized subjective focus on the accused's predisposition to commit a crime has some definite virtues in the terrorist context. The traditional fear that the subjective approach will allow the State to prey on those with past convictions is not likely to be a factor in many terrorism cases. Moreover, the subjective approach allows the accused to argue that he or she would never have committed the crime unless subject to a sting that was motivated by fear and suspicion based on the accused's religious or political beliefs. The United States Supreme Court in *Jacobson* emphasized the need for evidence of predisposition prior to State involvement and courts should be cautious about relying on behavior after the accused was subject to a sting as evidence of predisposition.[53]

Courts should focus on predisposition to commit terrorist crimes and not the political or religious beliefs that may motivate terrorist acts. It is particularly important to maintain this focus if, as in *Siraj*, evidence of the accused's religious and political extremism is held to be admissible.[54] Professor Said has suggested that "it is inevitable that the predisposition analysis delves into matters of an individual's political and religious beliefs."[55] He suggests that in the context of Muslims accused of terrorism, the admissibility of political and religious views will trigger social equations between Islam and terrorism thus making the American subjective predisposition test "no defence at all."[56] Professor Said's pessimistic conclusion is well supported by the post-9/11 record of no recorded entrapment-based acquittals in American terrorism cases.[57] Nevertheless, it discounts the requirement in *Jacobson* that the accused's predisposition to commit the crime be established before the government's involvement. To be sure, the government will be given extensive latitude to establish subjective predisposition, but there are limits to how far the government can go in admitting evidence of the accused's religious and political beliefs in order to establish subjective predisposition.[58] Judges should make it crystal clear to American juries that the issue is whether the accused was predisposed to commit terrorist *crimes* before being contacted by an informer and subject to a sting. Evidence of even extreme political and religious *opinions* or *beliefs* should not be sufficient to establish subjective predisposition to commit terrorist *crimes*. Professor Said's pessimism about the entrapment defense seems to be based on concerns about how the jury will deliberate more than concerns about entrapment doctrine. In order to respond to these legitimate concerns, it will often be necessary to screen potential jurors and challenge for cause those who are not able to distinguish between political and religious beliefs and a predisposition to commit terrorist crimes.[59] There is no guarantee that jurors will follow the law, but the subjective predisposition test provides an important resource against discriminatory targeting.

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[52] *Impediments*, *supra* note 24, at 569; *Covert Surveillance*, *supra* note 24, at 493.

[53] Jacobson v. United States, 503 U.S. 540, 549 (1992).

[54] *Siraj*, 468 F. Supp. 2d at 420.

Despite valid concerns about how American juries have and will administer the entrapment defense, the American federal test allows those accused of terrorism to argue that they were victims of discriminatory targeting decisions and that they had no predisposition to commit terrorist crimes. A genuine conclusion that the accused has been shown beyond a reasonable doubt to have been predisposed to commit a terrorist crime should rebut allegations that the State has created terrorist crimes by targeting young Muslims. Such conclusions should help convince the public, including Muslim communities, of the criminality of those convicted of terrorist crimes even after prolonged stings. In other words, the subjective focus on the accused's pre-existing predisposition to commit the crime should, if properly applied, amplify the denunciatory effects of the terrorism prosecution.

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[55] Said, *supra* note 8, at 732.

[56] *Id.*

[57] *Id.*

[58] United States v. Al-Moayad, 545 F.3d 139, 161-63 (2d Cir. 2008) (overturning terrorism conviction on the basis that the trial judge had allowed the government to introduce prejudicial evidence of limited relevance to establish predisposition).

[59] Laura K. Donohue, *Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law*, 59 STAN. L. REV. 1321, 1330-32 (2007).

Although the terrorism context confirms the importance of requiring proof of subjective predisposition, it also will likely influence how far judges will allow state agents to go in inducing the commission of a crime. Judge Posner, in an influential opinion outside of the terrorism context, has suggested that an accused's lack of ability to commit a terrorist crime should be an important factor in the predisposition test.[60] The wisdom of this approach in the terrorism context is, however, questionable in part because of the seriousness of the offense. For example, the supply by state agents of materials such as explosives that are not readily available but could be used for terrorism could actually strengthen conclusions that the accused were prepared to go ahead with the acts.[61] Similarly, it may be inappropriate to apply the defense of excessive governmental involvement that has been recognized in some cases as an alternative to entrapment in cases where the accused was predisposed to commit the crime.[62] Although it may be excessive for the State to supply materials to targets in a drug case, it may not be excessive to do so in terrorism cases given the State's compelling interest in preventing terrorism and the unique dangers that a terrorist plot may quickly develop beyond preliminary planning and ideological stages to operational stages that can inflict mass casualties. The existing literature on entrapment and terrorism similarly stresses that courts will likely allow the State to take greater liberties when conducting terrorist stings as opposed to drug or prostitution stings.[63] The greater latitude that will be extended to the State once a person has been targeted in a terrorist investigation makes it even more important to ensure the propriety of the initial targeting decision.

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[60] United States v. Hollingsworth, 27 F.3d 1196, 1200 (7th Cir. 1994).

[61] United States v. Lakhani, 480 F.3d 171, 172 (3rd. Cir. 2007).

[62] United States v. Twigg, 588 F.2d 373, 377 (3rd. Cir. 1978). I am indebted to Arnold Loewy for bringing this case to my attention.

B. Canada and England

The Anglo-Canadian entrapment doctrines, unlike the American federal doctrine, will require courts in all cases to address the legitimacy of the initial targeting decision and find either a reasonable suspicion or a bona fide inquiry. This has the virtue of providing some judicial regulation of all of the State's targeting decisions.

Those conducting terrorist stings should be aware that they may have to produce admissible and public evidence to justify their targeting decision. Nevertheless, police, intelligence agencies and prosecutors in Canada and England can avoid having to establish that they had a reasonable suspicion that targeted individuals were involved in terrorism by establishing that they were conducting a good faith or bona fide investigation of a particular crime or location. Although the Supreme Court of Canada has been relatively deferential to the State in allowing brief acts of random virtue testing in areas associated with drugs,[64] courts should take a less deferential approach in terrorism cases because such stings will generally be more intrusive than in drug or prostitution cases and because they may also implicate political and religious freedoms and claims to equal treatment without discrimination from law enforcement officials. At the least, courts should require the

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[63] Stevenson, *supra* note 4, at 125.

[64] R v. Barnes, [1991] 1 S.C.R. 449 (Can.). *But see* R v. Swan, [2009] CarswellBC 798 (B.C.C.A.) (WL), 244 C.C.C. (3d) 108 (holding that there is no reasonable suspicion or bona fide inquiry when the police made cold drug calls to numbers supplied by an informer of unknown reliability).

State to demonstrate a reasonable suspicion that a particular location or group is associated with terrorist activities and not just religious or political extremism.

Many attempts to raise the entrapment defense in terrorism prosecutions will fail, but the reasons that are given by judges for dismissing such claims are important. An accused in a recent prosecution of a Toronto terrorism plot unsuccessfully raised an entrapment defense. The State to its credit did not rely on a bona fide investigation or the accused's religious and political beliefs as the justification for offering the accused opportunities to commit crimes in an elaborate sting involving multiple informers, a training camp and a controlled delivery of substances represented to be explosives capable of detonating three truck bombs in downtown Toronto.

The judge in the Toronto case characterized the preliminary requirement of reasonable suspicion as "meaningful but not onerous" and held that it was satisfied because the accused both associated with a person planning a terrorist bomb plot and counseled him about his terrorist activities and how to evade surveillance by intelligence agencies.[65] The judge also concluded that while the police informer used deception, he did not induce the commission of the crime and nothing that the informer did would have pressured a reasonable person with the strengths and weaknesses of the accused to commit such a serious offense.[66] The judge also emphasized that the "degree of harm posed by the bomb plot was so substantial that it is difficult to comprehend. The approach taken by the police through their agent . . . was not out of proportion. There is no evidence of any threats being made by the police . . . ."[67]

The Toronto terrorism case suggests that judges will not ignore the seriousness of the crime when determining whether there has been improper inducement, but it also illustrates how the State can satisfy the reasonable suspicion requirement without relying on either random virtue testing or the accused's religious or political beliefs. Even when entrapment defenses fail, as they often will, there is a value in the judge carefully explaining that the State had legitimate reasons for targeting the accused. In this sense the judge driven English and Canadian approach may have some advantages over the jury driven American approach because it will produce reasoned decisions that should stress that the State targeted the accused for legitimate reasons related to criminality and not simply because of the accused's religion or politics. The American approach which relies on jury verdicts may foster reasonable suspicion that jurors have dismissed entrapment defenses because they have wrongfully equated religious and political extremism with a subjective predisposition to commit a terrorist crime.

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[65] R v. Abdelhaleem, [2010] CarswellOnt 9938, para. 71 (Can. Ont. Sup. Ct. J.) (WL).

[66] *Id.* at para. 72.

[67] *Id.* at para. 75; *see also* Isabel Teotonio, *No entrapment in Toronto 18 case, judge rules*, TORONTO STAR, Feb. 16, 2010, *available at* http://www.thestar.com/news/gta/crime/article/766387—no-entrapment-in-toronto-18-case-judge-rules.

C. The European Court of Human Rights

The European Court of Human Rights' approach of apparently prohibiting active investigations may prove to be unrealistic when applied in the terrorism context. One of the advantages of sting operations as opposed to reliance on electronic surveillance is that stings may allow the State to better control the danger that a terrorist cell will quickly move beyond planning and preparation and actually initiate a terrorist act. In order to stay within a terrorist cell, undercover officers and informers may often have to go beyond the passive role that may arguably be required under the *Teixeira de Castro* decision. This does not mean that illegal conduct by such undercover operatives should be ignored. Nevertheless a strict requirement of passivity is arguably not needed in the European context. In Europe, undercover operatives are more likely to be held accountable for any illegal actions through judicial authorization of the sting or through a regime of legislative regulation of stings such as exists in England. In contrast, undercover stings in North America are primarily subject to ad hoc and after the fact judicial regulation.

European entrapment doctrine is more demanding than American, Canadian or English approaches in several respects.

As suggested above, the European Court seems to frown on proactive police investigations at least if they are not judicially authorized. The European Court also has yet to follow Anglo-Canadian law authorizing investigations into locations as an alternative to individualized suspicion, though such an approach might be implicit in some judicial authorization of terrorist stings, especially in cases where they are authorized on the basis of intelligence.

The European Court also takes a more holistic approach to entrapment and sees it as part of a broader right to a fair trial including disclosure of the State's case. In both *Edwards and Lewis v. United Kingdom*[68] and *V. v. Finland,*[69] the European Court of Human Rights found a violation of the right to a fair trial not because of actual entrapment, but because the accused was denied access to information that would be required to establish the entrapment defense. In the terrorism context, there may be compelling reasons to protect at least some of the background intelligence that might establish a reasonable suspicion to justify targeting a particular accused. For example, revealing the grounds for reasonable suspicion might reveal the existence of an informer among the accused's inner circle or the use of electronic surveillance in a particular location.

Although the European Court of Human Rights recognizes that the accused does not have an absolute right to disclosure and that disclosure can be limited for reasons related to national security, accused in terrorism cases may have some success in arguing either that they were entrapped or they were denied a fair trial because of the State's failure to disclose intelligence that is relevant to the entrapment claim. In this sense, European entrapment doctrine may be more of an impediment to proactive terrorism investigations and prosecutions than American or Canadian entrapment doctrine. That said, the European Court could back away from some of the more dramatic implications of its nascent entrapment doctrine and take an approach that defers more to regularized judicial decisions to target people as terrorist suspects including those made on the basis of intelligence not disclosed to the accused.

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[68] Lewis v. United Kingdom, 40 Eur. H.R. Rep. 593 (2004).

[69] V. v. Finland, [2007] Eur. Ct. H.R. 40412/98, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Finland%20|%2040412/98&sessionid=67017658&skin=hudoc-en.

The more robust restraints that the European Court appears prepared to impose on proactive investigations may be more acceptable if the ultimate remedy is damages and not an ending of the prosecution. The remedies for the entrapment defense are drastic in America, Canada and England because a successful entrapment defense results in an acquittal or a permanent stay of proceedings.[70] Concerns about remedies often influence liability rules. A desire to avoid acquittals and stays in serious terrorism cases risks diluting the American, and Anglo-Canadian entrapment defenses. At the same time, there is a danger under the European approach that damage awards may not be particularly meaningful for accused who are subject to entrapment, including discriminatory targeting decisions, and who are convicted and receive long imprisonment sentences for terrorism crimes. Indeed, the finding of entrapment may dilute the denunciatory value of the underlying criminal conviction by suggesting that the State has created the particular terrorist crime, perhaps in response to the politics and religion of the accused.

IV. Conclusion

The entrapment defense is likely to be claimed in terrorism prosecutions and the terrorism context is likely to affect the evolution of the entrapment defense. There will be a temptation for courts to water down the entrapment defense especially when its successful invocation might result in terrorists going free. In this sense, it is not surprising that the European Court of Human Rights has a more robust defense than Anglo-

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[70] In some cases, however, the entrapment defense may only apply to some part of a multi-part indictment. See United States v. Nettles, 400 F. Supp. 2d 1084 (N.D. Ill. 2005) for a case involving a sting where the accused was acquitted of material support of terrorism but convicted of counterfeiting and explosive charges.

American courts where an acquittal or a stay of proceedings is generally the only remedy for a successful entrapment defense.

It is likely and probably justifiable that the courts will give the State more leeway in terrorism cases in terms of proactively participating in ongoing stings over a matter of months and sometimes years. Although some extreme State behavior such as threats of violence should still cross the line and result in a finding of entrapment, it is unrealistic to expect undercover agents and informers to play a purely passive plot in ongoing terrorist plots. The European Court of Human Rights' entrapment jurisprudence is especially vulnerable to a critique that it sets unrealistic standards that could prohibit the proactive investigation of terrorism. This does not mean that anything goes or that undercover officers and agents should not face sanctions for illegal acts, but rather that the distinction between active and passive investigation is not sensitive enough to the challenges of investigating terrorism. In the American context, it may also be unrealistic to prohibit the State for supplying the means to commit terrorist crimes or to refrain from engaging in what in a drug or prostitution case might be thought to be excessive governmental involvement in a case.

Although the terrorist context will likely give the State more leeway in how stings are conducted, the State's initial decision to target the accused should be carefully examined by the courts in all the jurisdictions examined in this article. The danger is that people will be targeted for elaborate and intensive stings simply because of their political or religious beliefs and opinions and attendance at places of worship or political discussion. Such stings would adversely affect equality rights as well as freedom of expression and religion. They might also give support to those who would argue that terrorism crimes are being created by the State as religious and political crimes and do not represent a real threat of criminality and violence.

Different entrapment doctrines have different vulnerabilities when it comes to condoning discriminatory targeting decisions. Anglo-Canadian entrapment doctrine that allows targeting of particular locations or crimes without reasonable individual suspicion creates a risk of condoning random virtue testing of those who attend at certain locations of religious worship and political discussions. It should be recalled that random virtue testing in the terrorism context will generally be much more intensive and intrusive than that done in locations associated with illegal drugs or prostitution. For example, terrorist stings frequently involve the State agent engaging in prolonged discussions of religious or political matters with the accused. In the American federal system, there is a danger that the State could engage in discriminatory targeting and avoid having to demonstrate that the accused had a predisposition to commit a terrorist crime if judges hold that the sting did not induce the commission of the crime or if juries conflate subjective predisposition to commit terrorist crimes with extreme religious or political views.

Prosecutors and courts should be cautious about departing from individualized suspicion requirements and of accepting random virtue testing of those who participate in religious or political activities. Such random virtue testing will have discriminatory effects on Muslims and adverse effects on freedom of religion and expression. It could also give credence to arguments that the police target and harass radicalized Muslims into committing political or religious crimes. Courts should interpret alternatives to reasonable suspicion narrowly and insist on at least reasonable suspicion that the location being investigated is the site of terrorist activities and not simply political or religious radicalism. American courts should avoid deregulating initial targeting decisions by holding that the State has not induced the commission of the crime. They should also insist on requiring the State to demonstrate that there was a predisposition to commit a terrorist crime before the sting was started. Entrapment doctrine as applied to terrorism prosecutions should regulate the targeting decisions of the authorities in a manner that is sensitive to equality and freedom of speech and religion values.

The American entrapment defense has often been criticized for its subjective focus, but the terrorism context potentially places the subjective approach in a favorable light. The focus on the accused's predisposition to commit a crime has the virtue of serving as a powerful antidote to claims of discriminatory targeting for intense terrorist stings. To be sure, there is a danger that prosecutors will attempt to establish predisposition through evidence of religious and political extremism. This danger is aggravated by the fact that American juries, unlike English and Canadian judges, will not give reasons for why they have rejected an entrapment defense. Nevertheless, at the end of the day, if they follow American law, juries must be convinced of the accused's pre-existing predisposition to commit crimes of terrorism.

The reasonable suspicion requirement in Anglo-Canadian and European entrapment law and the American federal predisposition requirement should be embraced as a critical constitutional restraint on terrorism investigations. In the long run, such requirements will bolster the legitimacy of applying the criminal sanction to terrorists. The requirements of reasonable suspicion or subjective predisposition can ensure that terrorists are rightly regarded as criminals as opposed to the victims of discriminatory profiling and targeting or of the State creation of religious or political crimes.

ELECTRONIC SURVEILLANCE OF TERRORISM IN THE UNITED STATES

William Funk[*]

Over the past seventy-five years, American law relevant to government searches has distinguished between searches conducted for the purpose of gathering evidence to be used in a criminal trial and searches conducted for other purposes. Moreover, until 9/11, for both legal and practical reasons, foreign intelligence gathering (including counter-intelligence and anti-terrorism) proceeded along distinct and different tracks from law enforcement, only occasionally overlapping. Consequently, until recently, electronic surveillance for foreign intelligence purposes rarely had criminal prosecution as a goal.

Today, combating international terrorism, or the war on terror, has confused the historical distinction between intelligence gathering and law enforcement, just as it has confused the distinction between traditional criminal trials and the modes of operation applicable in recognized wars.[1] The purpose of this article is, first, to provide the history and context in which the distinction between law enforcement and intelligence searches has arisen and, second, as we go forward, to ask how we should address these issues in the future.

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[*] Robert E. Jones Professor of Law, Lewis & Clark Law School.

[1] On April 6, 2010, the New York Times reported that the President had authorized the targeting of an American citizen for assassination. *See* Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, Apr. 7, 2010, at A12, *available at* http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html. The American citizen is apparently hiding in Yemen and is believed to be involved in plots to carry out terrorist acts in the United States. Richard Reid (the shoe-bomber) was tried in a civilian court for violation of federal criminal law; Jose Padilla (the alleged dirty bomber) was initially held by the military and scheduled for trial by a military commission but ultimately was also tried in a civilian court for violation of federal criminal law. Khalid Sheikh Mohammed (the alleged 9/11 mastermind) was first to be tried in a civilian court but now appears headed for trial by a military commission, like the Nazi saboteurs in *Ex Parte Quirin*. 317 U.S. 1 (1942).

The United States has engaged in electronic surveillance for the purpose of gathering intelligence since at least the Civil War. For much of this time, the Supreme Court interpreted the Fourth Amendment's protections[2] against government searches to be linked to the protection against the use of evidence against a person in a criminal case.[3] In other words, the government could read the Fourth Amendment not to restrict its searches for intelligence information, so long as it was not to be used as evidence in a trial. Moreover, in 1928, the Supreme Court declared that electronic surveillance (not involving trespass to install) was not even subject to the Fourth Amendment because it did not constitute a "search."[4] There was, however, a statute applicable to wiretapping, the Communications Act of 1934,[5] which made it a crime for any person to "intercept" and "divulge or publish" the contents of wire and radio communications,[6] and the Supreme Court interpreted this provision to apply to the government.[7] Nevertheless, the government read the provision according to its terms as only prohibiting interception followed by divulging or publishing the contents outside the federal establishment.[8] In other words, the government believed it would not violate this provision by wiretapping to obtain intelligence information. Thus, the government believed that it could lawfully engage in both physical searches and electronic surveillance for intelligence purposes without being subject to the Fourth Amendment or other legal restrictions.

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[2] The text of the Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[3] *See* Boyd v. United States, 116 U.S. 616, 633 (1886) ("[T]he 'unreasonable searches and seizures' condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the fifth amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the fourth amendment."); *see also* Frank v. Maryland, 359 U.S. 360, 365-67 (1959) ("[H]istory makes plain, that it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought. . . . Inspection without a warrant, as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law, has antecedents deep in our history."), *overruled by* Camara v. Mun. Ct., 387 U.S. 523 (1967).

[4] *See* Olmstead v. United States, 277 U.S. 438, 465 (1928) ("The language of the [Fourth] amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office, any more than are the highways along which they are stretched.").

[5] 47 U.S.C. § 605 (1964).

[6] *Id.*

This state of affairs continued until 1967, when the Supreme Court decided two cases that radically changed this understanding. First, in *Camara v. Municipal Court*,[9] the Court rejected the notion that the Fourth Amendment's protections and the requirement of a prior judicial warrant were limited to situations in which the search was for evidence to be used in a criminal prosecution, overruling its earlier decision to the contrary. Now, the Fourth Amendment's warrant requirement applied to any governmental search. Second, in *Katz v. United States*,[10] the Court overruled *Olmstead* and held that electronic surveillance was a search subject to the Fourth Amendment. Thus, on their face, the cases wiped out the two basic legal justifications for searches and electronic surveillance for intelligence purposes – that they were not conducted to gather evidence for use in a criminal trial and that electronic surveillance was not subject to the Fourth Amendment. Nevertheless, *Katz* contained a footnote that the government could use to justify continued business as usual: "Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case."[11]

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[7] Nardone v. United States, 302 U.S. 379 (1937) (excluding evidence obtained from a wiretap); *see also* Nardone v. United States, 308 U.S. 338 (1939) (extending exclusion to the fruits of the surveillance).

[8] *See* S. REP. NO. 95-604, at 10 (1977).

[9] Camara v. Mun. Ct., 387 U.S. 523 (1967) (overruling Frank v. Maryland, 359 U.S. 360 (1959)).

[10] Katz v. United States, 389 U.S. 347, 359 (1967).

This language, while not authorizing intelligence searches or surveillance without a warrant, made clear that the *Katz* decision did not require one. Moreover, given the now equivalence between electronic surveillance and physical searches, the same uncertainty would apply to physical searches for intelligence purposes. The legal limbo of national security electronic surveillance was compounded when Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[12] which generally criminalized electronic surveillance but specifically authorized electronic surveillance to obtain evidence for use in the prosecutions of certain crimes. However, it too contained a disclaimer, saying that nothing in the Act should be read to limit the constitutional power of the President

> to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities . . . [nor] to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force . . . [or] any other clear and present danger to the structure or existence of the Government.[13]

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[11] *Id.* at 358 n. 23. The origin of the footnote is not certain; there is no mention of national security in the government's brief. However, the year before *Katz* the Solicitor General provided a supplemental brief in a case involving surreptitious microphone surveillance in a law enforcement case explaining that historically the FBI had used such devices

> for intelligence (and not evidentiary) purposes which [were] required in the interests of internal security or national safety. . . . Present . . . practice . . . prohibits the use of such listening devices (as well as the interception of telephone and other wire communications) in all instances other than those involving the collection of intelligence affecting the national security.

S. REP. NO. 95-604, at 12 (1977). This recent revelation must have been on the Court's mind when it decided *Katz*.

[12] Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified at 18 U.S.C. §§ 2510-2520 (Supp. V 1965-1969)).

[13] *Id.* § 2511(3).

The government's response was to institute new internal procedures, including a requirement for the personal authorization by the Attorney General under an express delegation from the President, before intelligence searches or surveillances could take place without a prior judicial warrant. The positive legal authority for the searches and surveillances would continue to be, in the absence of any positive legislatively granted authority, the inherent constitutional power of the President to obtain necessary intelligence information. The internal administrative procedures would provide the "safeguards" necessary to make the searches and surveillances reasonable.

In 1972, the Supreme Court narrowed the intelligence "exception" in *United States v. United States District Court*, known as the *Keith* case after the district court judge who was the respondent in the case.[14] There the government had engaged in domestic security electronic surveillance without a warrant. It argued that:

> [T]he special circumstances applicable to domestic security surveillances necessitate a further exception to the warrant requirement. . . . We are told further that these surveillances are directed primarily to the collecting and maintaining of intelligence with respect to subversive forces, and are not an attempt to gather evidence for specific criminal prosecutions. It is said that this type of surveillance should not be subject to traditional warrant requirements which were established to govern investigation of criminal activity, not ongoing intelligence gathering.[15]

The Court unanimously rejected the argument, holding that prior judicial warrants were necessary for domestic security surveillance, but again its opinion contained a disclaimer: "[T]his case involves only the domestic aspects of national security. We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents."[16] Thus, government surveillance for foreign intelligence information without a warrant continued where the Attorney General found that it was directed at foreign powers or their agents.

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[14] United States v. U.S. Dist. Ct. (*Keith*), 407 U.S. 297 (1972).

[15] *Id.* at 318-19.

[16] *See id.* at 321-22.

While a number of lower courts upheld the exercise of this power if the "primary purpose" of the surveillance was to obtain foreign intelligence information,[17] the claimed legal authority for warrantless surveillance for foreign intelligence remained on uncertain grounds. A plurality of the en banc D.C. Circuit had in dictum stated that a prior warrant is required even when the surveillance is directed at a foreign power or agent of a foreign power.[18] Investigations by House and Senate committees had uncovered a litany of intelligence abuses, including electronic surveillance of civil rights and anti-war groups during the Vietnam War,[19] resulting in bills introduced to ban intelligence surveillances altogether.[20] Moreover, third parties, whose help was often necessary to carry out foreign intelligence surveillances, were being sued for their complicity in the "abuses" and were reluctant to continue giving assistance.[21] As a result, the Ford administration supported a bill introduced by Senator Kennedy that would authorize electronic surveillance for foreign intelligence purposes pursuant to a special warrant requirement. This bill became the Foreign Intelligence Surveillance Act (FISA).[22]

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[17] *See, e.g.*, United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980) (stating that "the executive should be excused from securing a warrant only when the surveillance is conducted 'primarily' for foreign intelligence reasons"); United States v. Buck, 548 F.2d 871, 875 (9th Cir. 1977) (warrantless surveillances are "lawful for the purpose of gathering foreign intelligence"); United States v. Butenko, 494 F.2d 593 (3d Cir. 1974) (wiretap valid if primary purpose to gather foreign intelligence information); United States v. Brown, 484 F.2d 418 (5th Cir. 1973) (upheld warrantless wiretap against U.S. citizen); United States v. Clay, 430 F.2d 165 (5th Cir. 1970); United States v. Smith, 321 F. Supp. 424, 425-26 (D. Cal. 1971).

[18] Zweibon v. Mitchell, 516 F.2d 594, 651 (D.C. Cir. 1975).

[19] *See* S. REP. NO. 94-755, Bk. 2, at 67-74 (1976).

[20] *See* National Security Surveillance Act of 1975, S. 743, 94th Cong. (1975); Freedom from Surveillance Act of 1974, S. 4062, 93d Cong. (1974); Surveillance Practices and Procedures Act of 1973, S. 2820, 93d Cong. (1973).

[21] *See Foreign Intelligence Surveillance Act: Hearings Before the H. Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary*, 95th Cong. 64 (1978) (statement of Hon. Morgan F. Murphy, Chairman, Subcomm. on Legis. of the H. Intelligence Comm.) (testifying that FISA legislation would make the phone company "feel much more secure" in complying with electronic surveillance requests); *see also To Amend The National Security Act of 1947 to Improve U.S. Counterintelligence Measures: Hearings on S. 2726 Before the Select Comm. on Intelligence of the United States*, 101st Cong. 116-71, 136 (1990) (testimony of Mary C. Lawton, Counsel, Office of Intelligence Policy and Review, U.S. Department of Justice) (noting the failure of the phone company to cooperate with electronic surveillance requests).

FISA, however, does not follow traditional Fourth Amendment standards for judicial warrants. For example, it does not require probable cause to believe that the person subject to the surveillance was violating a criminal law or that evidence of a crime would be disclosed by the surveillance. In addition, it distinguishes between "United States person[s]"[23] and other persons,[24] providing more protective standards for United States persons. Moreover, unlike a normal warrant for electronic surveillance under Title III, there is a general rule against giving notice of the surveillance to those subject to it, and the length of the surveillance can be extremely long, up to a year for one surveillance with indefinite extensions. Also unlike a normal Title III warrant for law enforcement purposes, there is no comparable requirement to minimize the acquisition of information to that specifically described in the warrant. Instead, FISA substitutes limitations on disclosure and use.

These differences from a normal warrant were justified because the government had to certify that the "purpose of the surveillance is to obtain foreign intelligence information . . . ."[25] Consistent with its practice before FISA, the government interpreted this language to require the primary purpose of the surveillance to be obtaining foreign intelligence information, not enforcement of the criminal laws.[26] Thereafter, in every case in which FISA's constitutionality was challenged, the court upheld the constitutionality of FISA's warrant system, and in every case in which the issue was addressed, the court relied on FISA's "primary purpose" requirement.[27]

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[22] 50 U.S.C. § 1801 *et seq.* (1982).

[23] A "United States person" is a citizen or permanent resident alien, an organization substantially comprised of citizens or permanent resident aliens, and a corporation incorporated in the United States not subject to the control of a foreign government. 50 U.S.C. § 1801(i).

[24] These could include not only illegal aliens but also lawful, non-immigrant aliens, such as foreign students and workers.

[25] 50 U.S.C. § 1804(a)(7)(B) (1984).

[26] *See* William Funk, *Electronic Surveillance of Terrorism: The Intelligence/Law Enforcement Dilemma – A History,* 11 LEWIS & CLARK L. REV. 1099, 1123-25 (2007). *See* Pub. L. No. 107-56, § 218, 115 Stat. 291 (2001), where after passage of the USA PATRIOT Act, FISA changed to require merely that "a significant purpose" be to obtain

In 1995 Congress extended FISA's special warrant system to authorize physical searches within the United States for foreign intelligence purposes.[28]

The above discussion demonstrates the importance ascribed to the purpose of the surveillance being to obtain foreign intelligence information, rather than to obtain evidence for use in a criminal trial. Surveillances with the former purpose need not comply with traditional Fourth Amendment warrant requirements, while surveillances with the latter purpose were subject to the traditional requirements of the Fourth Amendment.

However, if a search or surveillance undertaken for a non-law enforcement purpose discloses evidence of a crime, that evidence could be used. Outside of the intelligence realm there is ample authority for the lawfulness of retaining and using, for law enforcement purposes, evidence incidentally acquired pursuant to non-law enforcement searches or surveillances.[29] This doctrine arises naturally from the Plain View Doctrine that allows law enforcement officers to seize evidence of crime

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foreign intelligence. *See* In re Sealed Case, 310 F.3d 717, 721 (FISA Ct. Rev. 2002), to understand how the government changed its tune as to the original meaning.

[27] *See* United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1992) (finding primary purpose required); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (finding a primary purpose required); United States v. Badia, 827 F.2d 1458, 1464 (11th Cir. 1987) (assuming a primary purpose requirement); United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984) (finding primary purpose required); United States v. Falvey, 540 F. Supp. 1306, 1314 (N.Y. Sup. Ct. 1982) (assuming a primary purpose standard).

[28] *See* Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, § 807, 108 Stat. 3423, 3443-53 (codified as amended at 50 U.S.C. § 1822-29 (2006)).

[29] *See, e.g.*, Illinois v. Lidster, 540 U.S. 419 (2004) (roadblock search for accident investigation); New Jersey v. T.L.O., 469 U.S. 325 (1985) (search of personal property to enforce school rules); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (border checkpoint search); *see also* New York v. Burger, 482 U.S. 691 (1987) (administrative search of vehicle dismantling operation); United States v. Biswell, 406 U.S. 311 (1972) (administrative search of firearms dealer); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (administrative search of liquor dealer).

in plain view when they otherwise are lawfully present.[30] Prior to FISA, all the courts considering the issue had found the doctrine applicable to electronic surveillance for foreign intelligence purposes.[31] FISA explicitly authorized the use of incidentally acquired evidence of crimes.[32]

When a search is lawful without a warrant, or pursuant to an administrative warrant so that incidentally acquired evidence may be used in a criminal prosecution, there is an incentive for the government to purport to be searching for the non-law enforcement purpose because of the lack of need to meet the stringent requirements for a traditional warrant. Courts have accordingly scrutinized whether the purported non-law enforcement purpose of the search was pretextual. If the real purpose was to obtain evidence of a crime, then a traditional warrant would be required. For example, in *Michigan v. Clifford*,[33] the Court approved the use of an administrative warrant to inspect a burned residence if the primary purpose was to determine the cause of the fire, but once the cause was determined to be arson, then the primary purpose would be to obtain evidence of the crime and a traditional warrant would be required. In the foreign intelligence field, the same rules applied. In perhaps the most famous spy prosecution to reach the Supreme Court,[34] Colonel Rudolf Abel of the KGB was arrested pursuant to an immigration arrest warrant for the purpose of deportation on the basis of information supplied by the FBI to the Immigration and Naturalization Service (INS) suggesting that Abel was an illegal alien. The arresting INS agents were accompanied by FBI agents, and the FBI agents searched Abel's residence incident to the arrest, looking for and finding evidence of espionage. Abel challenged the lawfulness of the search, arguing that his immigration arrest was simply a ruse to enable the FBI to search his residence. The Court responded:

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[30] *See* Coolidge v. New Hampshire, 403 U.S. 443, 465-66 (1971); *see also* 18 U.S.C. § 2517 (allowing the disclosure and use of evidence of a crime obtained through a lawful Title III surveillance even though not related to the purpose of the surveillance).

[31] *See* United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980); United States v. Butenko, 494 F.2d 593 (3rd Cir. 1974).

[32] *See* 50 U.S.C. § 1801(h)(3) (2006).

[33] 464 U.S. 287 (1984).

[34] *See* Abel v. United States, 362 U.S. 217, 226 (1960); *see also* LOUISE BERNIKOW, ABEL. (Ballantine Books 1982) (1970) (biographical account of Abel's life, focuses on his spy work, arrest, trial, and the government's exchanging of him for U-2 pilot Gary Powers); Federal Bureau of Investigation, Famous Cases: Rudolph Ivanovich Abel (Hollow Nickel Case), http://www.fbi.gov/libref/historic/famcases/abel/abel.htm (overview of Abel's espionage and the FBI's pursuit thereof).

> Were this claim justified by the record, it would indeed reveal a serious misconduct by law-enforcing officers. The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts. The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States.[35]

In addition, in *United States v. Truong Dinh Hung*,[36] what started as a surveillance for foreign intelligence purposes at a certain point became primarily a surveillance to obtain evidence of a crime. The Fourth Circuit held that at that point the surveillance was no longer lawful as foreign intelligence surveillance; it was now a law enforcement surveillance and required a Title III warrant.

So long as foreign intelligence surveillance was aimed at pure foreign intelligence, traditional counter-intelligence, or even international terrorism accomplished abroad against non-United States targets, drawing the intelligence/law enforcement line was generally not problematical, because criminal prosecution was rarely the sought-for goal.[37] However, the shift of international terrorism from non-United States targets abroad to domestic targets and United States targets abroad changed the nature of the problem. Now, criminal prosecution, or at least incarceration or incapacitation, was likely to be the primary goal, although the gathering of intelligence regarding the terrorists' contacts, plans, and infrastructure was also extremely important. What was the "primary" purpose even at the inception was no longer clear.

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[35] *Abel*, 362 U.S. at 226.

[36] 629 F.2d 908 (4th Cir. 1980).

[37] Successful counterintelligence operations often, if not normally, conclude not with prosecution but some other form of neutralization, such as "doubling" an agent. For example, the FBI arrested Rudolf Abel, a Soviet agent who operated undercover for ten years in New York City, only after failing to "double" him. *See Abel*, 362 U.S. at 223; *see also* 140 CONG. REC. S2883-02 (1994) (per Sen. Cohen) ("Prosecution is one way, but only one way and not always the best way, to combat such activities. 'Doubling' an agent or feeding him false or useless information are other ways. Monitoring him to discover other spies, their tradecraft and equipment can be vitally useful. Prosecution, while disabling one known agent, may only mean that the foreign power replaces him with one whom it may take years to find or who may never be found."); H.R. REP. NO. 95-1283, pt. I, at 43-44 (1978) ("[I]t may be more fruitful in terms of combatting [sic] international terrorism to monitor the activities of such

The solution, adopted in the USA PATRIOT Act in the immediate aftermath of 9/11 in light of allegations that the purpose requirement in FISA had hobbled FBI intelligence and law enforcement cooperation,[38] was to change FISA's requirement that the surveillance be for "the purpose" of obtaining foreign intelligence to a requirement that the surveillance merely have "a significant purpose" of obtaining foreign intelligence.[39] Now the primary purpose of the surveillance could be to gather evidence to use in a criminal trial even while the requirement to obtain the warrant did not require a showing of probable cause that the target was engaged in illegal activity or that evidence of a crime would be obtained. The question was then whether this solution comported with the Fourth Amendment.

The first court to consider the constitutionality of the USA PATRIOT Act amendment to FISA was the Foreign Intelligence Surveillance Court of Review (FISCR), the unusual "court of appeals" established in FISA to hear government appeals of denials of orders by the Foreign Intelligence Surveillance Court.[40] The FISCR, acknowledging that its answer was not governed by any "definitive jurisprudential answer,"[41] found the amended FISA facially constitutional

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persons in the United States to identify otherwise unknown terrorists here, their international support structure, and the location of their weapons or explosives.").

[38] *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 78-79 (2004); *see also* OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FBI'S HANDLING OF INTELLIGENCE INFORMATION RELATED TO THE SEPTEMBER 11 ATTACKS 21-42, *available at* http://www.fas.org/irp/agency/doj/oig/fbi-911/chap2.pdf.

[39] *See* Pub. L. No. 107-056, § 218, 115 Stat. 291 (2001).

[40] *See In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002).

[41] *Id.* at 746.

despite the lack of a primary purpose to obtain foreign intelligence. The FISCR believed the proper question to ask was whether a FISA search was "reasonable," as required by the Fourth Amendment, not whether the authorization of surveillance granted under FISA met the constitutional standards for a search warrant. It admitted that courts had found a primary purpose test constitutionally required where there was no prior judicial warrant, but the FISCR surmised that the additional safeguards created under FISA, beyond those that existed when foreign intelligence surveillances were conducted solely pursuant to the President's constitutional authority, sufficed to render the authorized surveillances reasonable on their face. The court noted the many similarities between FISA and Title III surveillances, while acknowledging the significant differences in their probable cause and particularity showings. Recalling that in *Keith* the Supreme Court had stated that even domestic security surveillances might be adequately governed by procedures different from those involved in "ordinary crime,"[42] the FISCR concluded that the similarities outweighed the differences given the nature of surveillances relating to foreign intelligence.

While the FISCR decision is highly defensible, it is well to remember that it was issued in an ex parte proceeding challenging the facial validity of the amended FISA.[43] Subsequently, while there have been a number of challenges to surveillances made pursuant to FISA, all but two have either ignored the change in the purpose requirement[44] or concluded that in any case the primary purpose of the surveillance was to obtain foreign intelligence.[45] The two exceptions are two district court decisions, one which found FISA as amended unconstitutional because of the lack of a primary purpose requirement[46] and one which found it still constitutional.[47] Law review articles on the constitutionality of the amended FISA abound,[48] some finding it constitutional, others not. In short, the issue certainly has not been determinatively decided.

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[42] *See Keith*, 407 U.S. 297, 322 (1972) ("[W]e do not hold that the same type of standards and procedures prescribed by Title III are necessarily applicable to this case. We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of 'ordinary crime.'").

[43] The FISCR did invite the American Civil Liberties Union and the National Association of Criminal Defense Lawyers to file briefs as amici curiae in the case, but this should not change the essential nature of the ex parte proceeding.

[44] *See* United States v. Damrah, 412 F.3d 618, 625 (6th Cir. 2005); United States v. Benkahla, 437 F. Supp. 2d 541, 554-55 (E.D. Va. 2006).

[45] *See* United States v. Stewart, 590 F.3d 93, 128 (2d Cir. 2009); United States v. Islamic Am. Relief Agency, No. 07-00087-CR-W-NKL, 2009 WL 5169536 (W.D. Mo. Dec. 21, 2009).

The issue here is less whether FISA as amended is constitutional according to established constitutional doctrine massaged in the inimitable American way, but rather the questions it raises about the nature of the struggle against international terrorism and the appropriate means to combat that terrorism consistent with retaining the individual freedoms citizens of developed nations have come to expect. First, we should not expect bi-partisan determinations agreed to by both political branches in an area of national security, in an apparent attempt to balance the needs of national security with individual liberties, to be likely overturned by courts on the basis of the Fourth Amendment. Here, the USA-PATRIOT Act amendment was made in the immediate aftermath of the 9/11, but it originally had a sunset provision that required it to be reconsidered in the future, under calmer conditions. It was, and the "significant purpose" change was retained. In other words, despite our general reliance on courts to protect individual liberties, history suggests that when national security is threatened from foreign aggressors, courts are likely to defer to the political branches. Here, moreover, that deference seems especially deserved, given the expression of concern for protecting both civil liberties and national security contained in the congressional materials.

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[46] *See* Mayfield v. United States, 504 F. Supp. 2d 1023 (D. Or. 2007), *vacated and remanded on other grounds*, 599 F.3d 964 (9th Cir. 2010).

[47] *See* United States v. Abu-Jihaad, 531 F. Supp. 2d 299, 304 (D. Conn. 2008).

[48] *See, e.g.*, Robert C. Power, *"Intelligence" Searches and Purpose: A Significant Mismatch Between Constitutional Criminal Procedure and the Law of Intelligence-Gathering*, 30 PACE L. REV. 620 (2010); William C. Banks, *The Death of FISA*, 91 MINN. L. REV. 1209 (2007); Diane Carraway Piette & Jesselyn Radack, *Piercing the "Historical Mists": The People and Events Behind the Passage of FISA and the Creation of the "Wall,"* 17 STAN. L. & POL'Y REV. 437 (2006); David S. Kris, *The Rise and Fall of the FISA Wall*, 17 STAN. L. & POL'Y REV. 487 (2006); Viet D. Dinh & Wendy J. Keefer, *FISA and the PATRIOT Act: A Look Back and a Look Forward*, 35 GEO. L.J. ANN. REV. CRIM. PROC. iii (2006); Richard Henry Seamon & William Dylan Gardner, *The PATRIOT Act and the Wall Between Foreign Intelligence and Law Enforcement*, 28 HARV. J.L. & PUB. POL'Y 319 (2005).

Second, the acceptance of the "war on terror" as more than a mere sobriquet, but as a legal concept in the United States, further supports approval of "war-time" measures. Unlike the "war on drugs" or the "war on crime," the war on terror, or at least the use of force pursuant to the Authorization for the Use of Military Force (AUMF),[49] has been accorded the status of "war" for many legal purposes.[50] Persons apprehended abroad, at least, may be treated as enemy combatants, and those alleged to have violated the laws of war (as today's terrorists routinely do) may be prosecuted by military commission for violation of those laws, rather than prosecuted as simple criminals, although their acts may well constitute federal crimes. Whether persons apprehended in the United States, and especially United States citizens, may also be tried by military commissions as unlawful enemy combatants, as were the saboteurs in *Ex Parte Quirin*,[51] is yet to be determined, although the government apparently maintains that it can.[52] Thus, limits on surveillance that might be appropriate if the purpose were ordinary law enforcement may not be appropriate if the prosecution is to occur in military tribunals under the laws of war. At the same time, despite the claims by the government of the ability to use military tribunals, so far none have been used, and it seems unlikely that they will be used for anyone apprehended in the United States. This accords with the practice in European nations, even those that have suffered serious terrorist acts on their soil, although the "Diplock courts" in Northern Ireland were extensively used in lieu of normal jury trials to try IRA activists, and at least in one case against a supporter of Al-Qaeda.[53]

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[49] Pub, L. No. 107-40, 115 Stat. 224 (2001).

[50] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

[51] 317 U.S. 1 (1942).

[52] Jose Padilla, a United States citizen apprehended in the United States, was held as an enemy combatant. Challenges to that designation, asserting that he could only be criminally charged, were heard by two separate courts of appeals. One held for Padilla. *See* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003). The other held for the government. *See* Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005). The first decision, however, was reversed on other grounds. *See* Rumsfeld v. Padilla, 542 U.S. 426 (2004). The second was effectively mooted by the government transferring Padilla from military to civilian custody and trying him in a civilian court for a federal crime.

Third, perhaps FISA's limitation to intelligence regarding *international* terrorism (and foreign powers and their agents) justifies a different basis for engaging in surveillance of citizens. Allowing border searches without any suspicion and intrusive border searches on a reasonable suspicion basis, rather than probable cause, are examples of how cross-border concerns can justify searches that otherwise would not be justified. While FISA is not limited to (or even primarily aimed) at cross-border communications, the interest justifying the search technique is one that necessarily involves foreign actors or governments. Given the reduced capability of the government to obtain information abroad short of surveillance, compared to the capabilities to obtain information through less intrusive techniques in the United States, more flexibility regarding surveillance regarding such information might be justified.

These are just the beginnings of the questions that might be asked about the appropriateness, absent traditional notions of probable cause, of electronic surveillance of persons in the United States for the purpose of apprehension and prosecution. Light might be shed upon them by reference to what other developed countries with a sensitivity for individual liberties are doing in this regard. While American exceptionalism frowns on following others, here, as in other areas, such a reference might well aid in finding a suitable resolution.

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[53] *See, e.g.*, *Al-Qaeda Terror Suspect Convicted*, BBC NEWS, Nov. 24, 2005, *available at* http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/4467640.stm.

RETHINKING SEARCH AND SEIZURE IN A POST-9/11 WORLD

Arnold H. Loewy[*]

In 2007, I presented a paper to the International Society for the Reform of Criminal Law in Vancouver, British Columbia, where I argued that 9/11 was responsible for many of the significant post-9/11, pro-Government Fourth Amendment decisions. My primary focus was upon three cases: *Hiibel*,[1] *Hudson*,[2] and *Harris*.[3] Subsequently, the Elon Law Review published my remarks as a brief essay.[4]

Today, upon reflection, I have come to believe that 9/11 may not have been primarily responsible for all of these decisions. Rather, they may more likely be attributable to the proclivities of the Supreme Court, and, at least some may well have come out the same way if 9/11 had never occurred. This essay is divided into two parts. In Part I, I shall discuss the extent that I now believe 9/11 was responsible for our post-9/11 decisions. In Part II, I shall discuss what our reasonable expectations at airports ought to be.

I

Starting with *Hudson*,[5] I have come to believe that 9/11 had little or nothing to do with the decision. *Hudson* was a decision not to take the exclusionary rule seriously. Its rationale was frighteningly simple. It goes something like this: If the exclusionary rule applies in a no-knock situation, the police are likely to be extra careful in their duty to knock. Hence, some may knock even when it is not necessary and thus risk losing evidence that could quickly be destroyed, or perhaps even risk being killed.

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[*] George Killam Professor of Criminal Law—Texas Tech School of Law. The author would like to thank Max Starkie, a third year law student at Texas Tech for his helpful research assistance and the participants at the Criminal Procedure Conference at Aix de Provence, France, as well as the participants at the second annual Criminal Law/Procedure Conference at Boulder, Colorado. Undoubtedly their comments helped minimize errors.

[1] Hiibel v. Sixth Jud. Dist. Ct. of Nev., 542 U.S. 177 (2004).

[2] Hudson v. Michigan, 547 U.S. 586 (2006).

[3] Scott v. Harris, 550 U.S. 372 (2007).

[4] Arnold H. Loewy, *Search and Seizure in a Post-9/11 World*, 1 ELON L. REV. 181 (2009).

[5] *See generally* Hudson v. Michigan, 547 U.S. 586 (2006).

Is this rationale related to 9/11? Well, perhaps. It is certainly plausible that the Court was worrying about deterring the police from catching terrorists. So, by giving the police added incentive to violate (or at least play fast and loose with) the knock-and-announce rule, it would be easier to catch terrorists. But, I am inclined to believe that the Court was far more general in its view of the case. It appears to me that it simply weighed the value of creating incentive to take the knock-and-announce rule seriously against the potential loss of evidence and plausible danger to the police,[6] and decided the Fourth Amendment interests lose.

In belatedly reaching this conclusion, I give more emphasis to the exclusionary rule trend that preceded *Hudson* by more than three decades. As early as 1974, in *United States v. Calandra*,[7] the Court began applying a cost/benefit analysis to exclusionary rule questions. And, more often than not, the Court overstated the cost or understated the benefit, or both, when applying the exclusionary rule.

To be sure, prior to *Hudson*, the Court had never held that a bad faith violation of a known Fourth Amendment duty failed to trigger the exclusionary rule.[8] So for that reason, coupled with the Court's incredibly gross undervaluing of the importance of police taking the Fourth Amendment (including the knock-and-announce rule) seriously,[9] I do view *Hudson* as something of a jurisprudential disaster. Nevertheless, I am now inclined to think that it was not a 9/11-caused jurisprudential disaster.

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[6] I say plausible because I think it is highly unlikely that if the police actually followed the rule (as, ironically, they did in *Hudson*), which requires reasonable suspicion that the evidence might be destroyed or that the suspect possesses a weapon, there is any need to dispense with the knock-and-announce rule.

[7] United States v. Calandra, 414 U.S. 338, 348-49 (1974).

[8] In fact, the violation in *Hudson* was not a bad faith violation. Indeed, I seriously doubt that it was a violation at all (but for the State's ill-advised concession that there was a violation). Nevertheless the opinion was written in such a way that it covers bad faith violations. Of course, the Court had previously given its blessing to good faith exceptions to the exclusionary rule. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984).

This conclusion is buttressed by the more recent case of *Herring v. United States*,[10] where the Court required more than a negligent error to trigger the exclusionary rule. In *Herring*, a case as unrelated to 9/11 as one could imagine,[11] the Court continued its excessive refusal to apply the exclusionary rule by arguing that the cost of the rule was too great because it freed a criminal due to the constable's blunder.

Two things about *Herring* stand out. First, under the exclusionary rule, the criminal would not have gone free because of the constable's blunder. Rather, he would have gone free because had the constable not blundered, the criminal never would have been arrested in the first place; i.e., if the police clerk had cleared her docket appropriately, the arresting officer would not have heard of Herring's erroneous arrest warrant, and he would not have arrested him.[12] Second, 9/11 had little, if anything, to do with the result.

Hiibel is a case that more clearly is related to 9/11. Decided just two and a half years after the 9/11 tragedy, the Court held that one upon whom there is reasonable suspicion must identify himself.[13] The problem with the case was not so much the duty of a suspicious person to identify himself as it was the person's understanding of why he was being asked for identification. Although the Court emphasized the suspect's almost taunting the police by asking to be arrested, it never came to grips with the police officer's refusal to answer the suspect's question of why he wanted identification.

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[9] *See* Arnold H. Loewy, *The Fourth Amendment: History, Purpose, and Remedies*, 43 TEX. TECH L. REV. 1 (2010).

[10] Herring v. United States, 129 S. Ct. 695, 698 (2009).

[11] A police officer bent on arresting a man who had come to the station to claim property, first asked his clerk if there were any arrest warrants outstanding on the man. Upon hearing there were none, he asked her to check with the clerk of the neighboring county, who found that there was one. Acting on that information, the officer arrested the man and found illegal weapons and drugs. The warrant turned out to have been recalled and thus was not currently valid. The error was that of a police clerk. *Id.* at 698.

[12] *See* Loewy, *supra* note 9, at 8-9.

[13] Hiibel v. Sixth Jud. Dist. Ct. of Nev., 542 U.S. 177 (2004).

One cannot read the Supreme Court's opinion without a sense that a policeman's ability to obtain identification from a suspicious person is a paramount need that should cause all else to yield. Even more clearly, the Nevada Supreme Court opinion reeked of 9/11:

> Most importantly, we are at war against enemies who operate with concealed identities and the dangers we face as a nation are unparalleled. Terrorism is "changing the way we live and the way we act and the way we think." During the recent past, this country suffered the tragic deaths of more than 3,000 unsuspecting men, women, and children at the hands of terrorists; seventeen innocent people in six different states were randomly gunned down by snipers; and our citizens have suffered illness and death from exposure to mail contaminated with Anthrax. We have also seen high school students transport guns to school and randomly gun down their fellow classmates and teachers. It cannot be stressed enough: "This is a different kind of war that requires a different type of approach and a different type of mentality." To deny officers the ability to request identification from suspicious persons creates a situation where an officer could approach a wanted terrorist or sniper but be unable to identify him or her if the person's behavior doesn't rise to the level of probable cause necessary for an arrest."[14]

So, I am inclined to still believe that *Hiibel* is largely attributable to 9/11.

Scott v. Harris[15] is somewhere in between. To be sure, yielding to authority, and not running from it, seemed far more important to the Court than it did in the pre-9/11 opinion of

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[14] Hiibel v. Sixth Jud. Dist. Ct., 59 P.3d 1201, 1206 (Nev. 2002) (footnotes omitted).

[15] Scott v. Harris, 550 U.S. 372 (2007).

Tennessee v. Garner.[16] On the other hand, some of the Justices seemed to have been swayed by a car chase video,[17] which in Justice Stevens'[18] and my view, clouded their judgment. I do think that *Harris*, like *Hiibel,* shows a Court demanding more respect from the citizenry to the police than might have been the case in an earlier world.

So, I do think that *Harris* would have been decided differently without 9/11 and without the video. Although both may have been a factor, I am inclined to give more weight to the video. Still, I do not think that 9/11 was irrelevant.

Perhaps the ultimate reason that I've backed off from blaming 9/11 is due to the cases that have cut in the opposite direction. *Brendlin v. California*[19] unanimously allowed a passenger to have standing to challenge a seizure of an automobile in which he was riding. While entirely consistent with past doctrine, it certainly was not preordained thereby.[20]

Even more significant, the recent case of *Arizona v. Gant*[21] overruled (or some would say artificially distinguished) past precedent allowing police to search vehicles incident to a valid arrest. Under the Court's new *Gant* rule, the police would have to have reason to believe that evidence of a crime could be found in a car before the search would be permissible. While a perfectly sensible decision, it runs counter to what one might have suspected, if the ghost of 9/11 were pulling the Court's strings.

So, I have come to conclude that 9/11 may not be as major a factor in the Court's search and seizure decisions as I once believed.

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[16] Tennessee v. Garner, 471 U.S. 1 (1985).

[17] A video of the car chase in *Scott v. Harris*, 550 U.S. 372 (2007), was especially powerful for much of the Court, convincing it that the force used to terminate the chase was appropriate.

[18] *See Harris*, 550 U.S. at 395-96 (Stevens, J., dissenting).

[19] Brendlin v. California, 551 U.S. 249, 251 (2007).

[20] In *Rakas v. Illinois*, the U.S. Supreme Court held that a passenger in an automobile with the permission of the owner could not challenge the constitutionality of a *search* of that automobile. 439 U.S. 128, 133, 148-49 (1978).

[21] Arizona v. Gant, 129 S. Ct. 1710 (2009).

II

The most obvious place where 9/11 rears its ugly head is in airport searches. Cases like *Florida v. Royer*,[22] where we worried about the level of suspicion necessary to search a suitcase at an airport, seem so quaint. In *Royer,* the Court held that in the absence of probable cause to arrest, or consent obtained when the defendant was not detained for too long (and in *Royer*, fifteen minutes was too long), the police could not search Royer's checked luggage. Today, on the other hand, travelers are warned not to lock their checked luggage so that TSA officials will not have to break the lock should they choose to search the checked luggage.

To be sure, there is a difference between the *Royer* search, which was for evidence of crime, and today's TSA searches, which are for ensuring the safety of air travel. But the bottom line is the same. The correct response to the question of how much reasonable expectation of privacy does one have on his checked airline luggage is zero.

Well, is this a good thing? I guess, most reluctantly, I have to say "yes." I know in advance not to put anything in a suitcase that I don't want others to see. By knowing that rule in advance, I am less likely to be embarrassed by the discovery of anything that I strongly do not want strangers to see. Also, the zero expectation of privacy is limited to the TSA. I do not believe that in a case like *Royer* the DEA agents are permitted to search his suitcase without probable cause or consent. Of course, I suspect that in future *Royer*-like cases, the police will simply ask the TSA to "randomly" search the traveler's bag, and that would be the end of it.

Safety is obviously on the government's side of the balance. I am sure that bombs are found in only an infinitesimal number of searched bags. On the other hand, the *in terrorem* effect of these random searches may have deterred some unknown number of would-be bombers. Is it worth the trade-off? Frankly, it's a close call. I am less than thrilled when I arrive somewhere with a suitcase filled with wrinkled clothes, following a TSA search. (For this reason, I try to avoid checking luggage, even though my "platinum" status with American Airlines lets me check it at no extra charge.) Still, at least for now, I am inclined to think that the safety trade-off is worth it.

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[22] Florida v. Royer, 460 U.S. 491, 493-94 (1983).

I do question the need for shoe removal. So far as I know, there has never been an attempted shoe bomber in the United States. Richard Reid, the famous shoe bomber who caused all this inconvenience, left from Charles De Gaulle Airport in Paris. Ironically, the last time I passed through security at Charles De Gaulle (which was after the attempted shoe bombing), I was *not* required to remove my shoes.

Of course, one could argue that the harm of a shoe bomber is so great that the added inconvenience really is worth the candle. Surely one would not want to be the executive in charge of eliminating the requirement when (if) a successful shoe bombing should occur.[23] Yet, since Reid's abortive attempt, so far as I know, there has not been another attempt even though few, if any, European Airports practice routine shoe removal, even on international flights.

Some of the post-9/11 airport seizure rules are downright silly. Sometimes soft cheese is confiscated and sometimes it isn't. A package of dry ice to keep food cold is forbidden, but a package of frozen food, which does the same job, is ok. One cannot bring a bottle of water through security because it could contain a corrosive liquid that could blow up the plane. Ironically, three days before 9/11, I was flying from Dallas to Austin with a bottle of water. Before boarding the plane, the ticket agent asked me to take a drink of water from the bottle. That seems like such a sensible alternative to confiscating the water that I have to wonder why TSA hasn't thought about it.

Whether the no water rule, along with limited toothpaste size and other annoyances, are actually seizures is a tougher question. The government doesn't actually seize it, it just doesn't let you take it on the plane. It seems to me that the government could (and ought to) be more reasonable on things like this. But whether I can find a home for this preference in the Fourth Amendment is surely a closer call that may never be litigated.

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[23] I thank Professor William Pizzi of the University of Colorado for this helpful insight.

The question upon which I would like to focus the remainder of my essay is whether an individual upon being told that he has been randomly chosen to be frisked or to have his bag searched has the option of leaving the airport rather than submitting to the search. In this section, I am not discussing the case of a person whose x-ray triggers a need for an additional search or whose behavior triggers reasonable suspicion. Rather, my focus is on the person who has triggered no suspicion, but is randomly chosen for a further search.

To illustrate, on a flight from Lubbock to Dallas, I was told that I was selected for a random frisk and was asked if I consented. Having previously been told that if I say "no" I wouldn't be permitted to fly,[24] I said, "I don't consent, but if you think that you have the power to frisk me without my consent, I won't interfere." Evidently he so thought, since he conducted the frisk.[25]

But suppose that I had said, "No, you may not frisk me. I value my dignity too much. I'll just leave." Could I have left, and would that have been the end of it? One might think so. The Supreme Court, however, has not yet ruled, and the lower courts (especially the Ninth Circuit of all places) seem to hold that leaving is not an option.

A good testing case is *Torbet v. United Airlines*,[26] which straddled 9/11. The facts occurred pre-9/11, but the case itself was decided in 2002. The facts were these: Hugo Torbet, an attorney, attempted to catch a commuter flight from LAX to San Francisco. He willingly allowed his carry-on bag to be x-rayed. The x-rayed disclosed nothing suspicious. Nevertheless, Torbet's carry-on bag was chosen for a random search. When Torbet refused to consent, policeman Mike Edwards was called, who informed Torbet that his bag was to be searched. Torbet responded that he'd rather leave the airport. Edwards informed him that leaving was not an option, whereupon Edwards instructed security personnel to search the bag. Finding nothing of interest, Torbet's bag was returned and he was permitted to catch his plane, which he did.

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[24] Actually, I was first told that on a flight from Melbourne to Brisbane, Australia, but I assumed that the rules were the same in the United States.

[25] Thankfully, the frisk was conducted in a less intrusive way than that described in *Terry v. Ohio*, 392 U.S. 1, 16-17 n.13 (1968).

[26] Torbet v. United Airlines, 298 F.3d 1087 (9th Cir. 2002).

Subsequently, Torbet sued United Airlines, the Board of Airport Commissioners, the City of Los Angeles, Officer Edwards, and fifty unnamed defendants for $1,000,000 as compensatory and punitive damages for the violation of his Fourth Amendment rights. Apart from whether the damages sought for Torbet's inconvenience and offense may have been a tad pricey, the Court had to ascertain whether Torbet's Fourth Amendment rights had been violated at all. The Court's answer was "no."

The Ninth Circuit agreed that Torbet, and everyone else, had a right to avoid being searched by simply choosing not to fly. The Court held, however, that once Torbet put his bag on the x-ray machine conveyor belt, the functional equivalent of consent to x-ray, he was not free to withdraw his consent. Consequently, the search of his bag was not unreasonable.

But, why couldn't he withdraw his consent? After all, the special need justifying the search is his flying on the plane. If he is willing to give up that opportunity, is there any need to search his bag anyway? The Ninth Circuit said "yes." Its apparent concern was giving potential terrorists safe exit. That is, it did not want to say to the terrorists, "Try sneaking something through the x-ray machine and if you get away with it, blow up the plane, but if they ask to do a hand search of your bag, just leave." So, the potential *in terrorem* effect of a secondary random search may reduce the number of potential highjackers who try it in the first place.

I find myself unpersuaded. Explosives or firearms are highly likely to show up on either an x-ray or a magnetometer. If an explosive can elude both of those, is it likely to be found by a secondary search? Possible, sure. But likely, no. Still, the government can argue that possible is good enough. But to win *Torbet*, it should have to go further. Not only should the government have to establish that possible is good enough to justify a random secondary search, it should establish that the fear of a possible secondary search that cannot be avoided once the primary search has been conducted has enough of a deterrent effect on terrorists that it is worth the added anguish to travelers who would prefer forgoing travel to being subjected to such a search.

Of course, if *Torbet* had arisen post-9/11, I suppose that it would be clear that all bags are subject to being searched once they have been put on the x-ray machine and that x-rays and hand searches are just alternate ways of accomplishing the same thing. However, a secondary random frisk may present the same issue today.

Let us hypothesize that a fairly sophisticated traveler knows that one out of every ten airline travelers is randomly frisked even though there is nothing suspicious about him.[27] Further, let us assume that this particular traveler is quite averse to strangers feeling his body and, like the Supreme Court in *Terry*, does not consider it a "petty indignity."[28] Further, assume that this traveler has purchased a ticket, like Torbet, for a commuter flight from Los Angeles to San Francisco. Finally, assume that his purchase is for a flight that will get him to San Francisco several hours before his first business meeting.

Our hypothetical traveler hopes that he will not be the one in ten selected for what he considers a demeaning frisk. But, if he is, he would simply opt to leave the boarding area, lose the value of his ticket, and purchase another ticket for a later plane ride, thus getting to San Francisco and avoiding the frisk. Put differently, he'd rather pay the $100 extra for the flight than subject himself to the indignity of the frisk.

Should he be allowed that choice? It is worth repeating that there was nothing suspicious about his behavior. He was simply randomly selected for a frisk.[29] But, some would say, that the mere act of choosing to miss an already-paid-for ticket rather than undergo a routine frisk is itself suspicious. I now turn to that argument.

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[27] I'm not sure if that it is an accurate number, but I suspect that it is close.

[28] *Terry*, 392 U.S. at 16-17.

[29] Candidly, I am not sure how random these frisks are. I recall that awhile back, when I went through security in Houston, a TSA agent told me that she was suspicious of what I correctly told her were wallets in my front pants pockets. Because of her suspicions, she directed me to secondary screening where her colleague told me that I had been "randomly" selected for a secondary screening. Nevertheless, for the remainder of this paper, I shall assume that secondary screenings are, or at least can be, random.

It certainly is unusual for a person to forego the value of a plane ticket rather than submit to what frankly is usually a rather cursory frisk. Indeed, it may be fair to say that for every ten people willing to forego a plane ticket to avoid a frisk, nine are guilty of concealing something unlawful,[30] while the other one, like Torbet, simply values his Fourth Amendment privacy more than his plane ticket.

Well, if the odds are nine to one, isn't that more than enough for reasonable suspicion or probable cause? My answer is "no," for two reasons. First, historically, refusal to consent has not constituted reasonable suspicion or probable cause, although surprisingly, no Supreme Court decision has directly so held. And second, probabilities simpliciter are insufficient to create probable cause or reasonable suspicion.

The principal reason refusal to consent cannot constitute reasonable suspicion is a policy one. If refusal to consent constituted reasonable suspicion, the right to refuse would be rendered nugatory. Statistics seem to indicate that most people who are asked by police to consent in fact accede to that request.[31] Undoubtedly many, perhaps most, of those who refuse to consent have something to hide. But that fact alone cannot make refusal constitute reasonable suspicion.

This is not to say that there may not be cases in which a person's refusal to consent, coupled with other facts and circumstances, might not constitute reasonable suspicion. For example, in *United States v. Homburg*,[32] a bomb threat had been phoned into the airport. Immediately thereafter, Homburg attempted to board a plane, awkwardly attempting to conceal a rectangular-shaped package in his pants pocket. He then asked for directions to the men's room. A security guard followed him into the men's room. Homburg entered a stall from which the officer could hear rustling sounds. Fifteen minutes later, Homburg emerged from the restroom carrying his suitcase and without the bulge in his pocket. Believing that he had transferred the item in his pocket (which could have been a bomb), security sought to search his suitcase. Homburg indicated that he'd rather leave, but the suitcase was searched anyway, and drugs were found.

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[30] Although not necessarily a dangerous weapon, some might be concealing other evidence of a crime, such as drugs. *See* United States v. Homburg, 546 F.2d 1350, 1351 (9th Cir. 1976).

[31] See Ohio v. Robinette, 519 U.S. 33, 48 (1996) (Stevens, J., dissenting), where a deputy testified in Robinette's case that he routinely requested permission to search automobiles he stopped for traffic violations. According to the deputy's testimony, he obtained consent to search in roughly 786 traffic stops in 1992, a year before Robinette's arrest.

[32] United States v. Homburg, 546 F.2d 1350 (9th Cir. 1976).

The court held (1) Homburg had a right to leave and that any original consent he may have given dissipated upon his decision to leave the airport,[33] and (2) there was reasonable suspicion, and in the context of this case, that was enough to search his suitcase.[34] In my view, the *Homburg* Court was right on all counts. Consent should be withdrawable. But in the context of this case, reasonable suspicion justified the search.

Well, how is this different from a person simply walking away from a frisk? Aren't the odds just as great that a person who refuses a frisk on pain of losing his spot on the airplane is as suspicious as the events in *Homburg*? My answer is to revert to a hypothetical I use when teaching my class about probable cause. Suppose that in a particular city block of Main Street, between Fourth and Main and Fifth and Main, it could be established demographically that nine out of every ten men on the street between 6 p.m. and 10 p.m. are carrying drugs. Would that create probable cause (or reasonable suspicion) to arrest any man found on that block of Main Street at the requisite hours?

The answer, I believe, is "no." Probable cause and reasonable suspicion require more than demographic probabilities. There must be something specific to the defendant to create the probability as to him (perhaps a furtive gesture, an informant's tip, excessive nervousness, etc.). So, our question is whether the person who chooses to leave the airport rather than be frisked is more like the hypothetical resident of

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[33] *Id.* at 1352, *overruled on this point by* United States v. Aukai, 497 F.3d 955 (9th Cir. 2007).

[34] *Id.* at 1354.

Main Street or more like Charles Homburg in the *Homburg* case.

I contend that he is more like the resident of Main Street. Both the resident of Main Street and the guy who says "no" to a frisk are probably guilty. But neither has done anything other than what he has the perfect right to do (live on the 400 block of Main Street, or avoid unwanted fingers probing his body). Homburg, on the other hand, engaged in a series of unusual acts that clearly pointed towards guilt.

Some might argue that one who goes through all of the trouble appurtenant to flying and then, after all that, would give up his place on the plane as well as his cost of the ticket just to avoid a silly little frisk is very suspicious indeed. I guess I do agree that it is odd, especially since the frisks are not typically as extreme as a *Terry* frisk.[35] Still, I see a vast difference between refusing a frisk simpliciter and the circumstances in the *Homburg* case.

If the person who refuses to be frisked were treated like Homburg, it would be hard to distinguish the Main Street case. Moreover, a person with an extreme adversity to being probed by strange fingers would never be permitted to fly even if he were willing to eat the cost of a ticket whenever he was randomly chosen for a frisk. I find that scenario unacceptable. It is, at best, marginally protective of safety and extraordinarily unreasonable for the person who takes his bodily autonomy seriously.[36]

Well, suppose we changed the rules and announced in advance that every person boarding a plane will be subject to a frisk. Were that the rule, every person would know that before boarding a plane he or she would be frisked. Would that make it better under the "misery loves company" rule?[37] It would certainly eliminate the complaint by the traveler that "I didn't know I would be frisked." It would also require an even more wholesale invasion of our freedom from suspicionless searches. It probably would only marginally delay the already delayed airline boarding system, assuming that the average frisk took only about thirty seconds.

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[35] Query whether the particular traveler knows how relatively unintrusive the frisk is likely to be.

[36] Perhaps he could be required to submit to a full body x-ray in lieu of a frisk, although full body x-rays are even more intrusive to some than a frisk (though presumably not to a frisk-averse person).

[37] A concept derisively introduced by Justice Rehnquist in his dissent in *Delaware v. Prouse*, 440 U.S. 648, 664-65 (1979) (Rehnquist, J., dissenting).

To some extent, these questions are similar to the one with which I begin my criminal procedure class: "How big a deal is it to be searched anyway?"[38] If the answer is that it is not very important, then the airport answers become obvious—the government can do what it wishes. But, of course that is not the theory of our Fourth Amendment. As Justice Jackson reminded us, shortly after his return from Nuremberg, "[u]ncontrolled searches and seizures is one of the first and most effective weapons in the arsenal of every arbitrary government."[39]

The heightened level of TSA searches does not make the United States an arbitrary government, but the magnitude of these searches is greater than it needs to be and a step in the wrong direction. While I am not at all sure that the courts will help reign in the TSA, it is my fondest hope that someone in the government will get the message that those airport procedures that are not really necessary for our security tread dangerously close to measures of dictatorial tyrants, from whom we are supposedly protecting ourselves.

EPILOGUE

Subsequent to writing this essay, TSA has upped the ante. Now at many airports, pockets have to be completely emptied (even of nonmetallic items) and all travelers need to raise their arms and go through an x-ray type scanner in full public view. The only alternative is a full frisk, which can be done in private.

I have heard considerable unhappiness expressed about this additional intrusion. Unquestionably, it has adversely affected our comfort level in flying. Hopefully, the additional x-ray level to which frequent fliers will be subjected will not adversely affect their health, but who really knows?[40]

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[38] *See* ARNOLD H. LOEWY, CRIMINAL PROCEDURE: CASES, MATERIALS AND QUESTIONS 1 (3d ed. 2010).

[39] Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

Has it made us safer? I am unaware of a single terrorist who escaped normal screening, but was caught by enhanced detection. Of course, that is not the whole question. The question is whether there are would-be terrorists who have abstained because of the increased security. Given that the old security seemed to be working just fine,[41] I would submit that the impact of the new and improved security is marginal indeed.

Perhaps our mistake was not to complain earlier. Now that TSA has a foot in the door, it is unlikely to back off its enhanced sense of entitlement. Perhaps the populace rising up in righteous indignation would make a difference. But it is not likely to happen. Just as we became used to removing our shoes, we will (or have) become used to emptying our pockets and displaying ourselves in the x-ray machine.

So, I reluctantly conclude that we are coming even closer to the dictatorial tyrants that I feared in the last paragraph of the non-epilogue portion of this essay. If any Congresspeople are reading this essay, it is my fondest hope that you are persuaded of the need to restore a reasonable police/citizen balance at our nation's airports.

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[40] *See* United States v. Montoya de Hernandez, 473 U.S. 531, 561 (1985) (Brennan, J., dissenting).

[41] I am unaware of a successful airplane highjacking since 9/11.

MAKING SENSE OF THE ETHNIC PROFILING DEBATE

Margareth Etienne[*]

INTRODUCTION

The debate over racial profiling, while appearing to have been settled at the close of the twentieth century, has been very much rekindled. Before the September 11, 2001 terrorist attacks, racial profiling was widely condemned in the United States. Public sentiment was decidedly against the practice, with up to 80% of Americans polled finding it unfair.[1] Remaining consistent with popular sentiment, American politicians supported this view and spoke out against the practice. President Bill Clinton described racial profiling as "morally indefensible," while Al Gore and George W. Bush both campaigned for the Presidency arguing that racial profiling should be abandoned.[2]

The events of September 11 changed everything. After September 11, the tide against the use of racial and ethnic profiling turned abruptly. According to polling data, nearly 60% of Americans, including racial and ethnic minorities who had most often been victims of the practice, believed that profiling of Arabs and Muslims in the context of border and airport searches was appropriate.[3] The increased public tolerance for racial and ethnic profiling as a legitimate law enforcement and anti-terrorism strategy was remarkable.

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[*] Margareth Etienne, Professor of Law, University of Illinois at Urbana-Champaign. Special thanks to Russell L. Weaver and all the participants of the 2010 Criminal Procedure Discussion Forum for providing a laboratory of interesting ideas and helpful comments.

[1] According to a 1999 Gallup Poll, 81% of respondents disfavored racial profiling. *See* Frank Newport, *Racial Profiling is Seen as Widespread, Particularly Among Young Black Men*, GALLUP NEWS SERVICE (Dec. 9, 1999), *available at* http://www.gallup.com/poll/3421/racial-profiling-seen-widespread-particularly-among-young-black-men.aspx; *see also* David Rudovsky, Debate, *Racial Profiling and the War on Terror*, 155 U. PA. L. REV. PENNUMBRA 173, 174 (2007), *available at* http://www.pennumbra.com/debates/pdfs/racial_profiling.pdf. Others have listed the percentage much lower at 60% but still well over a majority of the public. *See* David Harris, *Racial Profiling Revisited: "Just Common Sense" in the Fight Against Terror?*, 17 CRIM. JUST. 36, 36 (2002).

[2] Rudovsky, *supra* note 1, at 174.

The change in public sentiment coincided with a similar change in the official government stance on racial profiling. In November of 2000, less than a year before the 9/11 terrorist attacks, the United States Department of Justice issued a public statement decrying the use of racial profiling on the grounds that it violated important principles of democracy and equality:

> The guarantee to all persons of equal protection under the law is one of the most fundamental principles of our democratic society. Law enforcement officers should not endorse or act upon stereotypes, attitudes, or beliefs that a person's race, ethnicity, or national origin increases that person's general propensity to act unlawfully.[4]

Most notably, the Justice Department also called into question the necessity of profiling as a law enforcement tool, arguing that "[t]here is no tradeoff between effective law enforcement and protection of the civil rights of all Americans."[5] Perhaps these statements were more aspirational than they were descriptive or normative. In any event, the sentiment did not last. Less than a year following the Department of Justice statements, any aspiration of eliminating race as a factor in law enforcement investigations had vanished.

Days after 9/11, the Justice Department "launched the first large-scale detention of persons based on race and country of origin since the internment of Japanese Americans in World War II,"[6] even after the U.S. Congress passed legislation officially apologizing for the internment policy and describing the policy as "racial prejudice, war hysteria, and a failure of political leadership."[7]

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[3] *See* Sam Howe Verhovek, *Americans Give in to Race Profiling*, N.Y. TIMES, Sept. 23, 2001, at A1 (noting that a CNN/USA Today/Gallup poll taken a few days following the September 11 attacks revealed that 58% supported targeting passengers of Middle Eastern descent); *see also* Henry Weinstein et al., *Racial Profiling Gains Support as Search Tactic*, L.A. TIMES, Sept. 24, 2001, at A22 (68% of polled respondents favored targeting passengers of Arab descent); Harris, *supra* note 1, at 36.

[4] DEBORAH RAMIREZ ET AL., U.S. DEP'T OF JUSTICE, A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED iii (2000), *available at* http://www.ncjrs.gov/pdffiles1/bja/184768.pdf.

[5] *Id.*

Although the detention of Arabs and Muslims following September 11 did not parallel the internment of the Japanese,[8] it was quite significant. Thousands of immigrants were secretly incarcerated, and over 700 Arab or Muslim foreign nationals were arrested for investigation by order of the Attorney General.[9] The Department of Justice instituted a "Special Registration" program resulting in the detention of several thousand Middle Easterners.[10] The Department ordered another 5000 Middle Eastern men to be questioned regarding their links to terrorist organizations.[11] The radical change between the pre- and post-September 11 approaches to profiling is notable.

How did the Department of Justice square its post-9/11 actions with its pre-9/11 directives? Without abandoning its statement that it was prohibited to treat certain races as having higher criminal propensities than others, the Department created a profiling exception for counter-terrorism efforts. By 2003, the Justice Department's position was that "efforts to defend and safeguard against threats to the national security or the integrity of the Nation's borders" were distinguishable from racial stereotyping in criminal investigations.[12] While some government officials rejected this distinction,[13] the Department of Justice's position that profiling in the context of terror was different from profiling in the war on crime—became the prevailing view. Hence the debate over racial and ethnic profiling was reignited in the United States and around the globe.

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[6] Rudovsky, *supra* note 1, at 175.

[7] H.R. 442, 100th Cong. (1988).

[8] President Roosevelt issued an executive order in 1942 calling for the incarceration of all Japanese descendants in internment camps. *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

[9] Rudovsky, *supra* note 1, at 175.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] It should be noted that many in law enforcement publically decried this view. *See, e.g.*, Fox Butterfield, *Police are Split on Questioning of Mideast Men*, N.Y. TIMES, Nov. 22, 2001, at A1; Jim McGee, *Ex-FBI Officials Criticize Tactics on Terrorism*, WASH. POST, Nov. 28, 2001, at A1.

As with many heated and controversial issues, the opposing sides of this debate seem to converse past one another more than they appear to be engaging one another on related arguments. Nor is it easily predictable which constituents or communities support or oppose profiling in counter-terrorism efforts. Some members of minority groups who have previously been targeted for racial or ethnic profiling support it in counter-terrorism efforts.[14] Many members of the law enforcement community, who have been subjected to training and research regarding profiling practices, oppose its use in counter-terrorism.[15]

One reason for the vastly divergent and unpredictable responses to profiling is that the parties on both sides of the debate seem to be intermingling very different and sometimes unrelated arguments. In this paper, I seek to make sense of the debate rather than resolve it. I hope to bring the parties a bit closer together by exposing their true points of contention and clarifying areas where they may actually be closer to agreement than it appears. I examine four of the stickiest questions in the profiling debate that have gained little traction and thus remain the source of significant confusion or disagreement. What is racial profiling in counter-terrorism, and how does it differ from profiling in ordinary criminal cases? Is racial profiling an effective law enforcement tool? (And relatedly, what do we mean by effective?) Assuming it is a useful tool in counter-terrorism efforts, can it be properly implemented? Finally, is it a morally justifiable practice in a multicultural democracy given the grave security dangers we all face?

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[14] Rudovsky, *supra* note 1, at 175.

[15] McGee, *supra* note 13, at A1.

COMMON CONTENTIONS ON PROFILING

The first common point of contention in the racial profiling debate involves its definition. Defining racial profiling is a deceptively complex issue. Because profiling was first practiced in the traditional criminal law enforcement arena, there is great disagreement about what constitutes profiling in counterterrorism. One distinction drawn by those who oppose profiling in domestic criminal law enforcement but not in counterterrorism is that the former is profiling while the latter is not profiling at all. I consider this definitional issue in the first section below.

Beyond the definitional issue, the most critical question in the debate concerns the efficacy of racial profiling. Simply put, does racial profiling work? Is ethnic profiling effective? There is surprisingly little consensus on this straightforward empirical question despite the growing literature on profiling. The question regarding effectiveness highlights important differences regarding the presumed purpose of profiling. Depending on one's goals, it may be effective in some respects but not in others. Understanding what profiling is meant to accomplish—whether it is to deter terrorism generally, prevent particular known cases, capture and incapacitate attempted terrorists—is a critical precursor to determining its success.

Related to the efficacy question is a question regarding administrability. Some abolitionists may argue not only that profiling is ineffective against terror, but also that it has insurmountable problems of implementation. Put another way, it is ineffective in its current form and cannot be efficiently or pragmatically corrected. I consider the relatively little evidence to support this concern about the application of profiling policies.

Finally, because there are few clear answers regarding the effectiveness of profiling, many in the debate gravitate toward issues of law and morality in assessing the desirability of profiling. Whether ethnic profiling violates fundamental democratic principles or whether it is a critical tool in protecting democratic societies is another common sticking point in this controversy. I offer that this aspect of the profiling debate mirrors the debate regarding torture and can benefit from the literature in that context.

Defining Profiling

In the law enforcement context, racial profiling has been defined as government "action that relies on the race, ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity."[16] One response to the question of profiling in the terrorism context is that it is not in fact profiling at all. This assertion is based in part on the understanding that there is a well-accepted caveat to the prohibition against using race and ethnicity as an investigative factor. If race or ethnicity is part of the description of the suspect, its use as an investigative factor is not profiling.[17] Some could argue that because organizations such as Al-Qaeda and the Taliban have been identified recruiting and training predominantly Muslim and Arab male terrorist attackers, the targeting of Arab Muslims does not actually qualify as ethnic profiling. They could claim that it fits squarely instead into the "suspect description" exception.

This contention has arguable merit on both sides, depending on how profiling is defined. A routine airport search where there is no particularized suspicion or suspect is difficult to justify under the exception of ethnic description. The ethnic description exception makes great sense when the crime has already been committed and law enforcement is attempting to apprehend a suspect fitting the witness's description or some other photographic evidence. However, when officers are predicting or attempting to prevent the commission of a crime, reliance on race or ethnicity as a factor in narrowing their investigation is classic profiling. In other words, if predicting that someone of a certain description is likely to be committing a crime is classic profiling, then the airport search cases are indeed profiling and cannot be exempted under the description exception.

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[16] RAMIREZ ET AL., *supra* note 4, at 3.

[17] *Id.*

But the inquiry does not end there. It is not to say that classic racial profiling is never useful or effective. That issue will be addressed in the following section but should be considered separately from the question of what constitutes profiling in the anti-terrorism context.

Debating the Effectiveness of Racial Profiling

When the effectiveness of racial profiling is examined, most people want to know whether it in fact helps in the apprehension of "bad guys" doing "bad things." In the 1980s and 1990s, those bad guys were drug dealers, and many of the studies regarding the effectiveness of profiling tend to evaluate its role in the War on Drugs. In the United States, the practice of racial profiling gained ascendancy in the law enforcement of drug laws. In the criminal law context of the drug war, federal agents created profiles of drug couriers carrying large quantities of drugs to smaller markets along the nation's highways. This effort, named Operation Pipeline, involved training state and local police officers in identifying drug couriers based in part on age and race. African and Latino drivers were stopped at alarming rates for minor traffic violations in an attempt to discern whether they were also violating drug laws. As police officers made more traffic stops, the public wondered how many detentions resulted in actual drug arrests. The answer to this question is complicated by the fact that officers rarely kept records of stops that did not result in arrests. So the arrests that were made, and the fact that the suspects were disproportionately black or brown, further supported the notion that profiling worked.[18] Opponents of profiling were at a disadvantage in arguing that the practice was ineffective or bad policing because they lacked the supporting data. Instead, as an interim measure, they called for more stringent data collection by officers of all stops and the results of those stops.

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[18] *Id.* at 11.

Much of the empirical information we have regarding the effectiveness of these profile-initiated searches emerges from the federal and state data collection efforts by police officers. Data from various states, including Maryland, New Jersey, California, and New York, revealed similar results about profiling.[19] By way of example, a Maryland study, analyzed and conducted by Temple University professor John Lamberth, examined the number of African–Americans stopped on the highway for speeding.[20] Lamberth found that although 17.5% of speeders were black, nearly 72% of drivers stopped were black.[21] Blacks were evidently stopped at disproportionately high rates. While this may be lamentable for due process reasons, it doesn't reveal much about the effectiveness of the stops. The question of effectiveness is somewhat more complicated, and it depends in part on what the searches reveal.

A similar New Jersey study on productivity rates, found that the searches of whites differed only slightly from searches of white drivers. Searches of white drivers were 10.5% more likely to yield evidence of other criminal activity, while those of black drivers were 13.5% likely to yield such evidence.[22] This gives us more information regarding the effectiveness of these searches but not much more. To the extent that the searches produce useful evidence, they can be deemed effective regardless of the race of the motorist who is stopped.

From a "productivity" standpoint, one can argue that the black motorists were legitimately detained. Let's put aside for a moment whether productivity is the proper standard to evaluate effectiveness and consider the productivity argument on its own terms. Imagine that a police officer stops 100 out of 200 motorists for speeding. Imagine too that 24 of the 100 who are stopped are searched and found carrying drugs. Those 24 stops are legitimate and effective in curbing the drug trade even if 13.5 of them are minorities and only 10.5 of them are white. Those 24 might harbor claims of unfairness (but focusing on this here confuses the issue and therefore will be addressed below). These opponents of profiling do not necessarily have claims of ineffective policing. In order to make a case that the profiling practice is ineffective, or at least less effective than other investigative tools, we have to know something about the 100 motorists who were *not* stopped. If the productivity rate from stopping another group of 100 would be higher than 24%, then using race as a basis or a partial basis for detention is not an effective method. To further complicate matters, if police resources could be utilized in a way that would capture an even higher percentage of drug offenders than do traffic stops, that would also be an important indicator of the effectiveness of profiling.

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[19] *See* David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 280-81 (1999).

[20] *Id.*

[21] *Id.*

[22] PETER VERNIERO & PAUL H. ZOUBEK, N.J. ATT'Y GEN. OFFICE, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 28 (1999), *available at* http://www.state.nj.us/lps/intm_419.pdf.

The fruit of the investigation is the principal way in which scholars and law enforcement agents tend to assess the effectiveness of ethnic profiling in the terrorism context. However, the goal in counter-terrorist enforcement is arguably the prevention of harm through incapacitation. Assume for a moment that the population is divided into two groups: prospective terrorists who are without inhibitions and "will commit an act of terror regardless of the extent of enforcement" and others who would never commit a terrorist act regardless of law enforcement measures.[23] From this standpoint, terrorists are not deterrable, and so a government strategy such as racial profiling ought not to be judged on its ability to deter. Rather, its effectiveness ought to be measured on prevention grounds.

There are, of course, several problems with the questionable assumption that terrorists are not deterrable—even when the assumption is purposely exaggerated to make a point.[24] The world cannot possibly be divided between those who cannot be dissuaded from committing terrorist acts and those who cannot be persuaded to commit terrorist acts. No one is born a terrorist. Before a terrorist decides to join terrorist ranks, by definition, she must have belonged to the unlikely group of people who would not engage in terroristic behavior. There must be a range of commitment among not only those who have become entrenched in terrorist organizations, but also among those who are susceptible to joining them. The effectiveness of ethnic profiling can be judged on the basis of prevention as well as on the basis of deterrence.

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[23] Tomer Blumkin & Yoram Margalioth, *On Terror, Drugs and Racial Profiling*, 28 INT'L REV. L. & ECON. 194, 198 (2008).

[24] *Id.* at 199 (explaining that "[o]ur analysis that exemplifies the two polar cases" between non-deterrable crimes like terrorism and deterrable ones like drug trafficking should not be taken in face value).

Some studies relying on a game theoretic approach support this view.[25] For instance, in developing a model of radical political violence, de Figueiredo and Weingast argue that certain acts of perceived injustice by the majority groups against radicals may actually engender sympathy and incite people from moderate groups to join ranks with radical extremist sub-groups based on perceptions of unfair treatment at the hands of the target group.[26] The point here is not that acts like racial profiling are in fact unjust or unfair. They may be, but questions of injustice are too often entangled with questions regarding effectiveness. But they are, in fact, distinct questions.

The perception of injustice against their more extremist compatriots may create feelings of sympathy toward extremists and maximize the likelihood that the moderates would engage in terroristic violence. If this is true, then those who argue for or against profiling on effectiveness grounds have to differentiate between effectiveness in deterrence and effectiveness in incapacitation. It appears that law enforcement communities who oppose profiling worry that the practice could incite greater opposition and violence at one extreme.[27] At the other extreme, there is the milder concern that while profiling might not move individuals to violence, the anger against profiling practices might make it more difficult to recruit informants or witnesses to cooperate in capturing and punishing accused terrorists.[28] This, of course, would impact the effectiveness of profiling from an incapacitation grounds as well.

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[25] *See* Rui J.P. de Figueiredo, Jr. & Barry R. Weingast, *Vicious Cycles: Endogenous Political Extremism and Political Violence* 4-5 (Inst. of Governmental Studies, U.C. Berkeley, Working Paper No. 2001-9, 2001), *available at* http://escholarship.org/uc/item/5j47x3jv.

[26] *Id.*

[27] *See* Butterfield, *supra* note 13, at A1; McGee, *supra* note 13 at A1.

Debating the Feasibility of Implementation

Sometimes when scholars and practitioners argue that profiling doesn't work, I believe that they mean something entirely different from the effectiveness question addressed above. What they mean instead is that racial profiling, even if it produced the results it sought by those who employ it, is nearly impossible to implement adequately. There are two strains to this assertion. First is the claim that there is no single or constant ethnic profile for terrorists. Second is the claim that law enforcement officers would be incapable of implementing an ethnic or racial profile reliably. I consider each of these contentions below.

Who fits the Profile?

An important question to consider is what the terrorist profile would look like. Because all nineteen of the September 11 hijackers were Middle Eastern Muslim men, there is a sense in the United States that the group to be targeted for profiling should be Middle Eastern Muslims. Indeed, many of the measures taken or recommended by the Department of Justice immediately after the attacks targeted young male Muslims. Yet, even those who support ethnic or religious profiling in the context of counter-terrorism agree that terrorist groups are aware of the factors that raise suspicion among law enforcement agents and are responsive to those indicators.[29] Accordingly, Al-Qaeda can begin to change the demographics of its operatives in response to the use of ethnic profiling as a law enforcement strategy.[30] Those who argue that it is not within the criminal's control to alter his identity, contrary to other profile indicators, are right and wrong. They continue to see the terrorist as an individual with unchangeable characteristics rather than as an organization capable of enlisting individuals from various ethnic backgrounds to commit these brutal acts.

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[28] *Id.*

[29] *See* Blumkin & Margalioth, *supra* note 23, at 199 (acknowledging that the use of race in profiling may be a temporary strategy that may change as terrorist groups diversify).

[30] *Id.*

Indeed, if one examines many of the attempted terrorist acts in the United States, for example, they have been conducted by a fairly diverse group of individuals. Richard Reid, the "shoe bomber" who attempted to board a plane with explosives in his shoes, had a British mother and Jamaican father.[31] John Walker Lindh, the American-born Taliban soldier raised in Marin County, California, was convicted based on his activities with Al Qaeda.[32] Aafia Siddiqui, a mother of three with a degree from MIT, was on the FBI's most wanted terrorist list until her capture in 2008.[33] In 2009, a black Nigerian man named Umar Farouk Abdulmutallab was arrested for attempting to blow up a Detroit-bound transatlantic airliner.[34] More recently, Colleen LaRose, a white, blond American woman nicknamed JihadJane, was arrested for her involvement in a terrorist assassination plan.[35] Consider also local domestic terrorists such as the Atlanta Centennial Olympic bomber, the Oklahoma City Bomber, and the Unabomber. All of these are white American males whose combined terroristic acts have resulted in hundreds of deaths.

The stereotype of the terrorist on American soil can no longer be simplified as Muslim Middle Eastern males. Therefore, even if we could conclude that ethnic profiling "worked," its success as a law enforcement strategy would be short-lived. Terrorist organizations would recruit members from demographic groups that did not align with the stereotypical profile.

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[31] Alan Cowell, *The Shadowy Trail and Shift to Islam of a Bomb Suspect*, N.Y. TIMES, Dec. 29, 2001, at A1.

[32] Adam Liptak, *A Case of Buyer's Remorse That Could Linger for Years*, N.Y. TIMES, Apr. 23, 2007, at A12.

[33] CBN News, *U.S. Captures Top Female Terrorist Suspect*, Aug. 13, 2008, http://www.CBN.com/cbnnews/427466.aspx.

[34] Dan Eggen et al., *Plane Suspect Was Listed in Terror Database*, WASH. POST, Dec. 27, 2009, at A1.

[35] Carrie Johnson, *With 'JihadJane', A New Kind of Threat*, WASH. POST, Mar. 10, 2010, at A1.

Implementation Difficulties

Questions regarding the feasibility of profiling are raised in another context as well. Even if we could agree about the demographics of a profile, officer error would make it difficult to implement reliably. There is very little evidence in the research literature to assess the accuracy of officer perception of race and ethnicity in this context. There are unfortunate anecdotes that understandably cause concern. For instance, in one case, British officers killed a Brazilian electrician believing him to be Middle Eastern. While human error is present in all searches, there is no direct evidence to support that it would be greater with profiling than with other investigative strategies or search practices. One starting point for further research on this matter is the already significant body of evidence of the difficulties of cross-racial identification.[36] Of course, much of this past research occurred in a different context than racial profiling. Interested scholars will have to assess its applicability in this new situation.

The (Im)Morality of Racial Profiling

In the absence of empirical answers to many of the most important questions in profiling, the debate often returns to first principles.[37] That is to say, whatever its effectiveness and feasibility, it may be that the practice of subjecting members of a community for special investigation based solely on race or ethnicity is so abhorrent that it cannot be justified in a civilized democracy. The response to this claim is generally something like this: In the hierarchy of immoral acts, isn't it preferable to harm (or some would say inconvenience) a few if it would save the lives of many? In other words, this debate about rights and wrongs quickly becomes a debate about moral consequentialism.

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[36] *See* Robert K. Bothwell et al., *Cross-Racial Identification*, 15 PERSONALITY & SOC. PSYCHOL. BULL. 19 (1989) (concluding from meta-analysis review that own-race facial recognition bias is significant); Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984) (analyzing lab studies finding significant handicaps in cross-racial identification).

[37] It is worth noting that this is different from a debate concerning what specific legal doctrines like due process or equal protection might allow.

In this respect, the controversy over racial profiling in counter-terrorism is similar to the controversy over the use of torture in counter-terrorism. The prohibitionists argue that profiling violates fundamental civil or human rights while the advocates contend that those rights must bend in the face of public safety and the prevention of a catastrophic loss of lives. There are other similarities about the arguments used in these debates and the rhetoric they employ.

The famous "ticking time-bomb" hypothetical is the favored trope used to consider the moral justifiability of torture. In its latest post-9/11 version, the hypothetical supposes that on September 11, 2001, law enforcement officials made a planeside arrest at one of the planes and learned that other planes were heading for unknown skyscrapers. In that instance, would the law enforcement officers have been justified in torturing the arrested terrorist in order to stop the attack or evacuate the targeted buildings?[38] There is a wide range of responses to the ticking time bomb hypothetical in the case of torture.

Supporters of the (limited) use of torture embrace the hypothetical as a way to divest the abolitionists of the moral high ground they claim to possess. The abolitionist who fails to concede that torture is permissible in this limited instance raises some skepticism about the nature of her moral principles. What, after all, is moral about permitting thousands of innocent people to be killed? However, if the abolitionist concedes to torture in this unique circumstance, she finds herself skidding along on a slippery slope. As David Luban has noted, the abolitionist's response to the ticking time bomb scenario provides a "gotcha" moment much like "getting the vegetarian to eat just one little oyster because it has no nervous system."[39] Critics of the hypothetical contend that it unfairly posits a highly unrealistic torture scenario in which authorities are omniscient about the existence of a threat and about the reliability of the information known to their suspect.[40] The sine qua non of the ticking time bomb scenario is that "we are sure that the detainee we are proposing to torture has information that will save thousands of lives and will give it up only if subjected to excruciating pain."[41] The ticking time bomb hypothetical doesn't exist, argue its critics, and reliance on it in making important decisions is a tremendous mistake.[42]

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[38] Alan Dershowitz, *Tortured Reasoning*, *in* TORTURE: A COLLECTION 257-77 (Sanford Levinson ed., 2004).

[39] David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1441 (2005).

What differs in the racial profiling case is that there is not yet a ticking time bomb scenario. While the ticking time bomb scenario is not commonly applied to racial profiling, it may be a useful tool in sharpening the issues raised on both sides. What would be the ticking time bomb equivalent of the racial profiling case?

Imagine that law enforcement agents obtain reliable information that an individual boarding a bus is a suicide bomber wearing a bomb that will detonate in minutes. Officials only have the time and resources to search a handful of passengers before the bomb will explode. Where should they begin? Should they conduct searches at random? Should they begin with passengers of a particular racial or ethnic group? Or focus on one gender?

The critiques raised by the ticking time bomb question in terrorism can also be applied to profiling. The hypothetical itself makes important assumptions that nearly never exist in real life. For one, it assumes a level of certainty by law enforcement that there is in fact a bomb and that a search of certain individuals will in fact produce it. It is almost never the case that officers know with absolute certainty that a terroristic act is about to take place. And if they do discover a plot in the making and have the description of the perpetrator or conspirator, then relying on that description is not racial profiling.

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[40] *Id.*

[41] Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1714 (2005).

[42] *Id.* at 1714-15.

Much like in the case of torture, the ticking time bomb hypothetical is too far-fetched to take seriously in the implementation of commonplace searches. Why permit this exaggerated scenario to guide policy in the everyday search scenario?

That said, torture is not comparable to a search. A misguided search does not have the same consequences as torture. Not surprisingly, most American courts would justify any reasonable search under a ticking time bomb scenario under the doctrine of exigent circumstances. The profiling debate is really only relevant in cases where there are no ticking time bombs or exigencies.

CONCLUSION

This paper is a theoretical contribution to the debate over racial and ethnic profiling in counter-terrorism. It seeks to carefully distinguish and categorize the arguments most commonly made on both sides with the purpose of providing clarity and adding linearity to existing arguments. I have shown that some of the stumbling blocks in the debate regarding questions of implementation and definition are not insurmountable. I have discussed briefly why the issue of effectiveness is extraordinarily complex as an empirical and a policy question. I also suggested that the utilitarian arguments used in the similar debate surrounding torture do not work in this context to justify profiling. While this analysis will not resolve the debate, it highlights material differences between the two sides of the debate and identifies critical research questions that may lead to resolution.

THE U.S. SUPREME COURT, THE WAR ON TERROR, AND THE NEED FOR THICK CONSTITUTIONAL REVIEW

Mark S. Kende[*]

INTRODUCTION

In certain mystery stories, the murder weapon is made of ice and melts, causing difficulties identifying the murderer.[1] This is a useful metaphor for describing three of the U.S. Supreme Court's major cases regarding the "war on terror."[2] The media and some experts pronounced the cases as rule of law victories.[3] Undoubtedly, the Court deserves praise for rejecting the most extreme executive power claims being made. Yet the cases are like the disappearing weapon, since some Guantanamo detainees remain in limbo. Paradoxically, these opinions have even aided presidential administrations in holding the detainees indefinitely.

Part I of this paper will show that each of these three Court decisions did not go far enough in addressing key issues about how the U.S. military commission system for detainees should work. Part II will discuss the resulting lower court difficulties in determining what procedures the commissions must follow, and even whether the Supreme Court's rulings apply to detainees outside of Guantanamo, such as at the Bagram military base in Afghanistan. Finally Part III will argue that Article III judges should be sent to Guantanamo to conduct trials on a rotating basis to ensure independence and promote legitimacy. This solution rejects various arguments from the Bush and Obama Administrations. I will also suggest that the Supreme Court's unwillingness to address certain questions, or challenge certain assumptions, in wartime cases, is frequently a mistake. Specificity is needed when vital rights are at stake.

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[*] Dean's Visiting Scholar, Georgetown University Law Center (2010-2011). Professor of Law, James Madison Chair in Constitutional Law, Director of the Drake Constitutional Law Center. Thanks to Matt Bishop for his research assistance. I want to thank Professor Russell Weaver and the participants in the 2010 University of Aix-Marseille Criminal Procedure Forum for their helpful comments and criticisms.

[1] *See, e.g.*, EDGAR JEPSON & ROBERT EUSTACE, THE TEA-LEAF (1925), *available at* http://gaslight.mtroyal.ca/tealeaf.htm.

[2] Boumediene v. Bush, 553 U.S. 723 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

[3] David Stout, *Justices Rule Terror Suspects Can Appeal in Civilian Courts,* N.Y. TIMES, June 13, 2008, *available at* http://www.nytimes.com/2008/06/13/washington/12cnd-gitmo.html.

I. THE TRILOGY

The Bush Administration responded to the horror of September 11, 2001 by attacking the Taliban and Al Qaeda in Afghanistan.[4] Yet the Administration maintained this was not a typical war, covered by the Geneva Convention, since neither group was the legitimate government of a nation.[5] Moreover, Al Qaeda did not follow the laws of war since they deliberately murdered innocent civilians.[6] The September 11 conspirators were not ordinary criminals as they had primarily political goals, were hostile to the U.S., and were part of an international movement of Jihad.[7]

The Administration also had practical motivations, namely to reduce the enemy's legal protections in a stated effort to ensure future attacks against Americans did not occur.[8] Thus, the U.S. engaged in coercive and even torturous interrogation techniques at times, used rendition to foreign countries, and deprived detainees of contact with attorneys, humanitarian organizations, and family for as long as feasible.[9] These actions violated Geneva as well as American criminal law.[10] The President labeled many of the detainees "enemy combatants" to confirm their novel status.[11] Indeed the U.S. opened Guantanamo because it was presumed to be a law-free zone where U.S. courts lacked jurisdiction.[12] The Supreme Court in *Rasul v. Bush*,[13] however, ruled otherwise about Guantanamo.[14] This was one of numerous serious legal errors made by Bush's legal counsel.[15]

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[4] *See Hamdan*, 548 U.S. at 568-69.

[5] *See id.* at 628-29.

[6] *See id.* at 673-74.

[7] *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 47-70 (2004).

[8] *See* Tim Golden & Don Van Natta, Jr., *Administration Officials Split Over Stalled Military Tribunals*, N.Y. TIMES, Oct. 25, 2004, *available at* http://www.nytimes.com/2004/10/25/international/worldspecial2/25gitmo.html ("'[Prisoners] may well have information about future terrorist attacks against the United States,' said Vice President Dick Cheney. 'We need that information.'").

A. Hamdi

The U.S. Supreme Court decided *Hamdi v. Rumsfeld*[16] in 2004. The issue was whether the U.S. government could detain an American citizen as an enemy combatant.[17] Mr. Yaser Esam Hamdi was being held in a South Carolina military brig with no apparent charges against him, no access to counsel, no access to family, and no visits by NGO's allowed.[18] Fortunately, his father found out and retained an attorney who challenged this situation.[19] The government responded that the President had such inherent executive authority in wartime, as part of the unitary executive theory.[20] Moreover, a Congressional Authorization of the Use of Military Force ("AUMF"), adopted shortly after September 11, also supported the detainment. The

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[9] *Id.*

[10] *See generally* Wayne McCormack, *The War on the Rule of Law*, 36 J. NAT'L SEC. F. 101 (2010). Numerous books have chronicled these gruesome events. *See, e.g.*, DAVID COLE, THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE (2009); JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO THE WAR ON AMERICAN IDEALS (2008).

[11] *See* Golden & Van Natta Jr., *supra* note 8.

[12] *Id.*

[13] Rasul v. Bush, 542 U.S. 466 (2004).

[14] *Id.* at 484.

[15] *See, e.g.*, Eric Lichtblau & Scott Shane, *Report Faults 2 Authors of Bush Terror Memos*, N.Y. TIMES, Feb. 19, 2010, *available at* http://www.nytimes.com/2010/02/20/us/politics/20justice.html.

[16] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

[17] *Id.* at 509.

[18] *Id.* at 510-11.

[19] *Id.* at 511-12.

[20] *See, e.g.*, JOHN YOO, CRISIS AND COMMAND (2009).

AUMF permitted the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks."[21]

The U.S. Supreme Court issued a decision that split on the merits.[22] The plurality opinion, authored by Justice O'Connor, upheld the President's power under the AUMF to declare Hamdi to be an enemy combatant.[23] This was a significant victory, though the Court refused to rule on the inherent authority theory.[24] Moreover, the plurality rejected the Administration effort to deprive Hamdi of all due process.[25] The Court said the government had to inform Mr. Hamdi of why he was being held, provide some contact with a lawyer, and give him a chance to rebut the accusations.[26] Justice O'Connor relied on a 1970s due process case called *Mathews v. Eldridge*,[27] which involved the termination of social security disability benefits. In *Matthews*, the Court said the amount of due process owed required weighing three factors: the burden on the individual, the interest of the government, and the risk of error.[28]

The *Hamdi* due process victory was also limited.[29] The Court said that Mr. Hamdi did not possess the right to a full criminal trial given his enemy combatant status.[30] The government need only provide some sort of military tribunal.[31] Moreover, evidentiary presumptions at trial could favor the government.[32] In addition, hearsay and other irregular evidence could be admitted.[33]

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[21] *Hamdi*, 542 U.S. at 510 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001)).

[22] *See generally id.*

[23] *See id.* at 516-24.

[24] *See generally id.*

[25] *See id.* at 524-39.

[26] *Id.* at 533.

[27] Mathews v. Eldridge, 424 U.S. 319, 323 (1976).

[28] *Hamdi*, 542 U.S. at 529 (citing *Mathews*, 424 U.S. at 335).

[29] *See id.* at 533-35.

[30] *Id.* at 535.

[31] *Id.* at 534.

Hamdi unfortunately never elaborated on these parts of its ruling.[34] The plurality didn't describe when hearsay should be admissible, whether coerced testimony could be admitted, or how far the evidentiary presumption shift could go.[35] It also didn't explain what kinds of military tribunals are permitted, how they should be structured, or what role at the hearing could be played by defense counsel and the accused.[36] The plurality could have retained its balancing test while still providing some specifics.[37]

The most disturbing part, however, is that the Court never set a time limit for when an enemy combatant must be brought to trial in front of a military commission.[38] All the Court said was that the detainees could be held until the end of hostilities.[39] Yet, this is a potentially never-ending "war on terror."[40] The Court therefore effectively permitted indefinite detention.[41] The Court also missed a chance to prohibit coercive interrogation, at least of American citizens.

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[32] *Id.*

[33] *Id.* at 533-34.

[34] *See generally id.*

[35] *See generally id.*

[36] *See generally id.*

[37] Notably, Justice Scalia authored an opinion finding that the Second Amendment guaranteed the right of individuals to bear arms. District of Columbia v. Heller, 554 U.S. 570 (2008). However, he went further and provided clarification that this did not preclude concealed weapons laws, as well as prohibitions on felons or the mentally disabled from carrying a weapon. *Id.* at 626-27.

[38] *See generally Hamdi*, 542 U.S. 507.

[39] *Id.* at 521.

[40] *See* Geoffrey Nunberg, *The -Ism Schism; How Much Wallop Can a Simple Word Pack?*, N.Y. TIMES, July 11, 2004, *available at* http://people.ischool.berkeley.edu/~nunberg/terror.html ("'The war on terror,' . . . suggests a campaign aimed not at human adversaries but at a pervasive social plague. . . . Like wars on ignorance and crime, a 'war on terror' suggests an enduring state of struggle—a 'never ending fight against terror and its relentless onslaughts,' as Camus put it . . . .").

[41] *See* Brief for ACLU et al., as Amici Curiae Supporting Petitioners at 6, *Hamdi*, 542 U.S. 507 (No. 03-6696), 2004 WL 354185 ("The Executive . . . has claimed this unlimited authority for an unlimited time. In the government's view, Hamdi can remain imprisoned for the rest of his life if the Executive deems it expedient. Nor is that scenario far-fetched. The conflict in Afghanistan has been expressly linked to the

Obviously, the plurality followed the tradition of judicial avoidance, especially during wartime.[42] Yet this was the beginning of a set of cases that allowed much military action regarding enemy combatants to go ungoverned. This in turn has facilitated tragedy. Military law expert Scott Horton has revealed the numerous suicides that took place at Gitmo.[43] Moreover, the resulting lower court chaos shows that the plurality's minimalism was misplaced.[44]

There were two well reasoned opinions. Justice Souter relied on a federal statute that prohibited the detention of U.S. citizens without charges, absent an act of Congress.[45] Souter concluded that Hamdi therefore could not be held.[46] Souter noted that the anti-detention law was passed in 1971 in reaction to the Japanese-American internment during World War II, and to the horrific decision in *Korematsu v. United States*.[47] Souter explained that the statute was controlling as it addressed the confinement issue more specifically than did the AUMF.[48] O'Connor, however, responded that the AUMF provided the Congressional authorization required by the statute.[49] O'Connor's argument is weak as AUMF's discussion about the use of force applied to the war abroad.[50] Souter

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broader 'war' against terrorism, and we have repeatedly been told that the 'war' against terrorism may never have a conclusive end.").

[42] Brief for the Respondents at 22, *Hamdi*, 542 U.S. 507 (No. 03-6696), 2004 WL 724020 ("The canon of constitutional avoidance counsels against interpreting [18 U.S.C. §] 4001(a) in a manner that would interfere with the well-established authority of the Commander in Chief to detain enemy combatants in wartime." (citing Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 466 (1989))).

[43] Scott Horton, *The Guantanamo "Suicides": A Camp Delta Sergeant Blows the Whistle*, HARPER'S MAG., Jan. 18, 2010, *available at* http://harpers.org/archive/2010/01/hbc-90006368.

[44] *See, e.g.*, Bostan v. Obama, 662 F. Supp. 2d 1, 3 (D.D.C. 2009) (calling the court's statements on the admissibility of evidence "ambiguous").

[45] *Hamdi*, 542 U.S. at 539-54 (Souter, J., concurring) (citing 18 U.S.C. § 4001(a) (2000)).

[46] *Id.* at 551-53.

[47] *Id.* at 542-43 (citing Korematsu v. United States, 323 U.S. 214, 223-24 (1944); H.R. REP. No. 92-116, at 2, 4-5 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1435-38).

[48] *See id.* at 547-48.

[49] *See id.* at 516-24 (plurality opinion).

[50] *See id.* at 547-48 (Souter, J., concurring).

nonetheless concurred in the part of O'Connor's decision stating that Hamdi was entitled to due process.[51]

Surprisingly, Justice Scalia dissented on the grounds that the plurality did not protect Hamdi's rights enough.[52] He explained that the government could not hold a U.S. citizen indefinitely without charges unless habeas was suspended.[53] The government therefore had to charge Hamdi with treason or let him go.[54] Interestingly, the Administration released Mr. Hamdi not long after the Court decision, suggesting he may not have been as dangerous as advertised.[55]

It's worth noting that one reason the media and scholars perceived *Hamdi* as a major rights victory was because of the government's extreme position, namely that this was a kind of political question that the Court could not decide.[56] This extreme approach facilitated the illusion of a major government defeat, even though the government actually got its military commissions and enemy combatants.

B. Hamdan

After *Hamdi*, each Gitmo detainee was supposedly given minimal due process in the form of a Combatant Status Review Tribunal ("CSRT") hearing.[57] The CSRT was required to allow the detainee to show he was not an enemy combatant.[58] President Bush also worked with the Defense Department and unilaterally established a military commission system.[59] The detainees would be tried in these commissions.[60] Mr. Salim Ahmed Hamdan, a Yemeni citizen, was Osama Bin-Laden's former driver and challenged the legality of the military commissions.[61] He was a non-citizen held at Guantanamo.[62]

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[51] *See id.* at 553.

[52] *See id.* at 554 (Scalia, J., dissenting).

[53] *See id.* at 563-69.

[54] *Id.* at 573.

[55] *See* Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES, Oct. 14, 2004, *available at* http://www.nytimes.com/2004/10/12/international/middleeast/12hamdi.html. The one troubling aspect of Justice Scalia's opinion is his disregard for the rights of legal aliens, as opposed to just citizens.

[56] *See, e.g.*, James Vicini, *Supreme Court Deals Blow to War on Terror*, REUTERS, June 28, 2004, *available at* http://www.commondreams.org/headlines04/0628-07.htm (quoting an ACLU representative who called *Hamdi* "a strong repudiation of the administration's argument that its actions in the war on terrorism are beyond the rule of law and unreviewable by American courts").

[57] *See* Christopher Marquis, *Pentagon Will Permit Captives At Cuba Base to Appeal Status*, N.Y. TIMES, July 8, 2004, *available at* http://www.nytimes.com/2004/07/08/world/reach-war-justice-pentagon-will-permit-captives-cuba-base-appeal-status.html.

The Court in 2006 ruled that the military commissions were illegal on two grounds.[63] First, the tribunal procedures did not comply with the Uniform Code of Military Justice ("UCMJ").[64] The commissions could exclude counsel and the accused from the proceedings, and deny them access to classified information being used as evidence.[65] And Congress had never approved the commissions.[66]

Second, the Court said Article III of the Geneva Convention applied (since these were supposedly not prisoners of war) and required that the government only place such detainees on trial in a "regularly constituted court."[67] These newly created tribunals did not qualify.[68] Justice Alito contested this latter point.[69] The Court also said there was no proof that use of more regular courts was "impracticable," as required by Geneva.[70] The problem with *Hamdan*, however, is that it did not establish specific rules for what must be done in a military commission, short of copying the UCMJ.[71] The ruling also licensed the Administration to work with Congress and therefore changed very little.[72] That is what happened.[73] Interestingly, the Court created more uncertainty by not addressing various constitutional issues, though Justice Kennedy touched on them in a concurrence.[74]

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[58] *See id.*

[59] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 568–69 (2006); *see also* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1260-66 (2002).

[60] *See Hamdan*, 548 U.S. at 569.

[61] *Id.* at 570.

[62] *Id.* at 566.

[63] *Id.* at 567.

[64] *Id.* at 613.

[65] *Id.* at 613-15. Justice Kennedy did not agree that the rules for excluding the accused from hearing certain evidence were illegal, so that part of the Stevens opinion was technically a plurality, not a majority.

[66] *See id.* at 568-69.

[67] *Id.* at 625-35.

[68] *See id.*

[69] *Id.* at 725 (Alito, J., dissenting).

[70] *Id.* at 623-24 (majority opinion).

C. Boumediene

The issue in this 2008 case was whether the revised military commission law was constitutional since it deprived Gitmo detainees of the right to file habeas petitions in U.S. federal courts.[75] Moreover, the law only provided for judicial review of CSRT determinations in the U.S. Court of Appeals for the D.C. Circuit.[76] The Supreme Court ruled 5-4 against the law in an opinion by Justice Kennedy.[77] This case almost never reached the Court, which denied certiorari towards the end of the previous term.[78] Justices Kennedy and Stevens, however, had warned then that they might reconsider if certain circumstances changed.[79] Ultimately, the Court did change its mind and take the case which is rather unusual.[80]

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[71] *See generally id.*

[72] *See generally id.*

[73] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

[74] *See Hamdan*, 548 U.S. at 636-55 (Kennedy, J., concurring). Martin Flaherty has authored a powerful article describing how the Court was hesitant and could have issued a ruling that had a stronger legal foundation. Martin S. Flaherty, *More Real than Apparent: Separation of Powers, the Rule of Law, and Comparative Executive "Creativity" in* Hamdan v. Rumsfeld, 2006 CATO SUP. CT. REV. 51. Stephen Vladeck likewise argues that courts should play an important role in such disputes, and contrasts his views with scholars such as Ben Wittes. Stephen Vladeck, *The Long War, the Federal Courts, and the Necessity/Legality Paradox*, 43 U. RICH. L. REV. 893 (2009) (reviewing BEN WITTES, LAW AND THE LONG WAR: THE FUTURE OF LAW IN THE AGE OF TERROR (2008)).

[75] Boumediene v. Bush, 553 U.S. 723, 732-33 (2008).

[76] *Id.* at 734.

[77] *Id.* at 730.

[78] Boumediene v. Bush, 549 U.S. 1328 (2007) (denying certiorari).

First, the Court held that these detainees had a right to seek habeas even though they were foreign citizens, were held outside the fifty states, and were labeled enemy combatants.[81] The Court focused on three criteria above all: the citizenship status of the detainee and the adequacy of the process for determining that, the nature of the sites where apprehension and detention took place, and the practical obstacles in the way of resolving the matter.[82]

Second, the Court ruled that the revised system did not adequately substitute for habeas.[83] The Court explained that the CSRTs were deficient since the detainee did not have a lawyer, may not know all the allegations, and may not be able to confront witnesses if the evidence is hearsay.[84] Indeed, studies by Seton Hall University, and reports by journalists, called into question how the CSRT's functioned, showing that they made errors and operated in procedurally irregular ways.[85]

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[79] *Id.* at 1329 ("Were the Government to take additional steps to prejudice the position of petitioners in seeking review in this Court, 'courts of competent jurisdiction,' including this Court, 'should act promptly to ensure that the office and purposes of the writ of habeas corpus are not compromised.'" (quoting Padilla v. Hanft, 547 U.S. 1062, 1064 (2006)).

[80] *See* William Glaberson, *In Shift, Justices Agree to Review Detainees' Case*, N.Y. TIMES, June 30, 2007, at A1, *available at* http://www.nytimes.com/2007/06/30/washington/30scotus.html ("Some experts on Supreme Court procedure said they knew of no similar reversal by the court in decades.").

[81] *See Boumediene*, 553 U.S. at 765-72.

[82] *See id.*

[83] *See id.* at 770-92.

[84] *See id.* at 783-86.

[85] MARK DENBEAUX ET AL., REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 2 (2006), *available at* http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf. It's noteworthy that West Point issued an academic rebuttal, but conceded there were some people at Guantanamo who probably should not be there. William Glaberson, *Pentagon Study Sees Threat in Guantanamo Detainees*, N.Y. TIMES, July 26, 2007, at A16, *available at* http://www.nytimes.com/2007/07/26/washington/26gitmo.html.

The Court also found that D.C. Circuit review was insufficient for two reasons.[86] That court could really only assess legal determinations, not factual findings.[87] And that court could not receive any newly discovered evidence produced by the detainee or his lawyers.[88] There were strong dissents.[89]

This case has been described as a victory for the detainees.[90] While the decision has allowed habeas cases, it still failed to clarify what the CSRT and the military commissions must do.[91] Thus, the Obama Administration proceeded with re-revised military commission procedures,[92] but those were also vigorously challenged.[93]

Moreover, some of these people have been held for over seven years and haven't been charged, though others have been released.[94] Even some high ranking Bush military commission officials and JAG lawyers resigned in dismay.[95] Several prosecutions have been dropped due to mistreatment of the detainee.[96] In addition, virtually no commission trials have occurred and serious problems have arisen in those few that commenced.[97]

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[86] *See Boumediene*, 553 U.S. at 786-92.

[87] *See id.* at 788-89.

[88] *See id.* at 788-91.

[89] *Id.* at 800-26 (Roberts, C.J., dissenting); *id.* at 826-50 (Scalia, J., dissenting).

[90] *See* William Glaberson, *Lawyers for Detainees Plan to Use Justices' Ruling to Mount New Attacks*, N.Y. TIMES, June 14, 2008, at A14, *available at* http://www.nytimes.com/2008/06/14/washington/14gitmo.html (quoting a detainee's counsel as saying that *Boumediene* "'appears to demolish this argument that the Constitution does not apply in Guantanamo Bay'").

[91] *See id.* ("'Now,' [a detainee's counsel] said, 'the battle lines are: Exactly what are the protections?'").

[92] *See* Military Commissions Act of 2009, Pub. L. No. 111-84, § 1801–07, 123 Stat. 2190.

[93] *See, e.g.*, Obaydullah v. Obama, 609 F.3d 444 (D.C. Cir. 2010); Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010), (en banc rehearing denied Aug. 31, 2010 (113 pages of concurring and dissenting views on rehearing)); Khadr v. Obama, 2010 WL 2814416 (D.D.C. July 20, 2010).

[94] *See* Charlie Savage, *Obama Team Split on Tactics Against Terror*, N.Y. TIMES, Mar. 29, 2010, at A1, *available at* http://www.nytimes.com/2010/03/29/us/politics/29force.html.

[95] Peter Finn, *Guantanamo Prosecutor Quits, Says Evidence Was Withheld*, WASH. POST, Sept. 25, 2008, at A6, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/09/24/AR2008092402101.html.

[96] Bob Woodward, *Detainee Tortured, Says U.S. Official*, WASH. POST, Jan. 14, 2009, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html. This has also caused the detainees to prevail in a

II. CHAOS REIGNED

These cases left chaos. First the D.C. federal courts adopted divergent standards on many crucial habeas issues because the judges formulated rules with constitutional implications via an ad-hoc common law method.[98] Second, it's not even clear whether *Boumediene* applies to other U.S. military bases, such as Bagram in Afghanistan.

A. *Procedures*

The Brookings Institution issued a powerful report in January 2010 regarding *Boumediene*'s legacy.[99] The Report is titled, "The Emerging Law of Detention: The Guantanamo

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variety of federal court habeas actions. Editorial, *Legacy of Torture*, N.Y. TIMES, Aug. 27, 2010, at A20 ("A new report prepared jointly by ProPublica and The National Law Journal showed that the government has lost more than half the cases where Guantanamo prisoners have challenged their detention because they were forcibly interrogated.").

[97] *Australia Lawyers Group Says Hicks Military Commission Trial 'A Charade'*, JURIST, July 24, 2007, http://jurist.law.pitt.edu/paperchase/2007/07/australia-lawyers-group-says-hicks.php; *see also* Carol Rosenberg, *Khadr's attorney airlifted from Guantanamo, trial delayed one month*, MIAMI HERALD, Aug. 14, 2010, http://www.miamiherald.com/2010/08/13/1776146/khadrs-attorney-airlifted-from.html.

[98] *Al-Bihani*, 590 F.3d at 870 ("The Supreme Court has provided scant guidance on these questions, consciously leaving the contours of the substantive and procedural law of detention open for lower courts to shape in a common law fashion."). The Chief Judge for the U.S. District Court for the District of Columbia gave a speech at the Brookings Institution regarding the Guantanamo disputes: "The majority opinion of the Supreme Court said we want these cases acted on expeditiously but we're not going to give the district court any guidance; we're sure they can figure it out. Very helpful." Larkin Reynolds, *Judicial Vacancies and Guantanamo*, LAWFARE BLOG (Mar. 2, 2011), http://www.lawfareblog.com. *See also* David G. Savage, *Little Headway Made at Guantanamo*, L.A. TIMES, Apr. 3, 2011, *available at* http://www.latimes.com/news/nationworld/nation/la-na-gitmo-20110403,0,2303087.story ("[*Boumediene*] only opened the door into court for detainees. The justices left much undecided, including the legal rules for determining who was an enemy combatant. The high court also did not say that judges could order the release of prisoners.").

[99] BENJAMIN WITTES, ROBERT CHESNEY & RABEA BENHALIM, BROOKINGS INST., THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING (2010), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2010/0122_guantanamo_wittes_chesney/0122_guantanamo_wittes_chesney.pdf.

Habeas Cases as Lawmaking."[100] Here was a partial list of unresolved judicial issues:

> 1. Can only enemy forces be detained or how about supporters, and how is this distinction defined? Must any support be substantial and what does that mean?
>
> 2. Can a detainee sever their relationship with the enemy and, if so, when? Is cooperation with the U.S. needed for this?
>
> 3. What evidentiary presumptions should be employed? Should relaxed standards be used since wartime evidence is harder to obtain? What kinds of hearsay should be allowed?
>
> 4. What happens with evidence obtained involuntarily? Must there be torture or some lesser standard?[101]

What is most significant is this statement from the Report's Executive Summary:

> So fundamentally do the judges disagree on the basic design elements of American detention law that their differences are almost certainly affecting the bottom-line outcomes in at least some instances. That is, some detainees freed by certain district judges would likely have had the lawfulness of their detentions affirmed had other judges—who have articulated different standards—heard their cases. And some detainees whose incarceration these other judge have approved would likely have had habeas writs granted had the first group of judges heard their cases.[102]

Admittedly, judges in ordinary federal criminal and civil cases can help bring about varied outcomes in similar cases. Yet this is not due to systematic confusion on governing legal principles and the like.[103] It's also true that the D.C. Circuit has finally resolved most of these issues in various appeals, but only after several years and not in ways that aggressively ensure fairer procedures.[104]

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[100] *Id.*

[101] *See id.* at 2.

[102] *Id.* at 3.

Ironically, Chief Justice Roberts predicted exactly this result when he dissented in *Boumediene*.[105] Yet his solution was to conclude that the CSRT and the review process were sufficient,[106] which is clearly incorrect.

B. Bagram

The D.C. courts are also divided over whether non-Afghan detainees brought to Bagram have a habeas right. Judge Bates of the U.S. District Court for the District of Columbia said yes,[107] but the D.C. Circuit Court of Appeals reversed.[108] The U.S. Supreme Court ruling in *Boumediene* should have addressed this type of scenario. One scholar has even compared the ambiguity of Justice Kennedy's opinion there with his vague ruling in the gay rights case of *Lawrence v. Texas*,[109] where Kennedy never announced a level of scrutiny.[110]

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[103] Another disturbing element is the disparity in sentences for various convicts. John Walker Lindh pled guilty related to fighting the U.S. in Afghanistan and got a lengthy term of imprisonment while others have received far less. *See* Adam Liptak, *A Case of Buyer's Remorse That Could Linger for Years*, N.Y. TIMES, Apr. 23, 2007, at A12, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C0DEEDA173EF930A15757C0A9619C8B63&sec=&spon=&pagewanted=all (comparing Walker, who accepted a plea deal for twenty-years imprisonment, with Yaser Hamdi, who faced no prison time, and David Hicks, who accepted a plea deal for nine-months imprisonment despite admitting involvement in more serious crimes than Walker).

[104] *See, e.g.*, Hatim v. Gates, No. 10-5048, 2011 WL 553273 (D.C. Cir. Feb. 15, 2011) (per curiam) (referencing other D.C. Circuit decisions resolving many of these questions). Of course, it is not clear whether the U.S. Supreme Court would agree with the D.C. Circuit's choices, as many experts do not. Deborah Pearlstein, *America's Panel on Guantanamo*, BALKINIZATION BLOG (Feb. 20, 2011), http://balkin.blogspot.com ("[T]he D.C. courts have now in key respects answered questions of what habeas hearings look like procedurally, and even who may be detained. I hardly agree with the courts' answers in all these respects . . . . We were also quite in agreement about many of the deficits of the military commissions."). The reference to "We" includes some former Bush Administration officials.

[105] *See* Boumediene v. Bush, 553 U.S. 723, 823-26 (2008) (Roberts, C.J., dissenting).

[106] *See id.*

[107] Al Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. 2009).

[108] Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010).

Admittedly, the D.C. Circuit used the three criteria adopted by the Supreme Court in *Boumediene* for determining whether habeas petitions should be allowed.[111] The Circuit then ruled that allowing habeas petitions from the Bagram base in proximity to the war zone could create practical problems.[112] Judge Bates found to the contrary.[113] The federal appeals court conceded that it would rule differently if there was evidence that the U.S. was moving prisoners to Bagram with the purpose of avoiding habeas.[114] The court, however, said such evidence was lacking.[115]

But the federal district court in February 2011 may have re-opened the door to Bagram habeas based on supposed new evidence and developments.[116] Indeed, critics have questioned why these prisoners were moved there, and suggested the appeals court has been overly deferential to the government. Bagram has now been called a "law free" zone by scholars such as David Cole.[117] Perhaps it's more accurate to call it a legal confusion zone given some recent investigative reporting on how detention works there.[118] Moreover, there is no way to be sure how the Supreme Court will vote if a Bagram or Parwan case reaches it. The Court's approach in these "war on terror" cases has not even created a minimally sufficient rule of law to govern a vital constitutional area.

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[109] Lawrence v. Texas, 539 U.S. 558 (2003).

[110] Posting of Steve Vladek to Balkinization, http://balkin.blogspot.com/2010/05/more-on-al-maqaleh-discomfiting-analogy.html (May 29, 2010).

[111] *Al Maqaleh*, 605 F.3d at 94: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

[112] *Id.* at 97-99.

[113] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 227-31 (D.D.C. 2009).

[114] *See Al Maqaleh*, 605 F.3d at 98-99.

[115] *See id.*

[116] Al Maqaleh v. Gates, Case 1:06-cv-01669-JDB Document 57, Feb. 15, 2011 (granting Joint Motion to Amend Petitions for Writ of Habeas Corpus); Lyle Denniston, *New Opening for Bagram Challenge*, SCOTUSBLOG (Feb. 15, 2011, 6:32 PM), http://www.scotusblog.com/2011/02/new-opening-for-bagram-challenge/.

[117] David Cole, *Law-Free Zoning*, THE NATION, May 27, 2010, *available at* http://www.thenation.com/article/law-free-zoning.

[118] Dianna Cahn, *Parwan Detention Center Reviews Ssuspects' Cases, But Finds Neither Guilt Nor Innocence in a War Zone*, STARS & STRIPES (Feb. 21, 2011), http://www.stripes.com/parwan-detention-center-reviews-suspects-cases-but-finds-neither-guilt-nor-innocence-in-a-war-zone-1.135491.

III. ARTICLE III JUDGES ARE THE ONLY SOLUTION

The federal courts are the only place that have a strong record of successfully trying terrorism cases.[119] These courts already have procedures in place so judges don't have to make them up. These courts adjudicated the first World Trade Center bombing cases.[120] Courts can also solve classified information problems, and security issues, as they have in the past.[121] The Obama Administration offered to help with the security question by purchasing an unused rural Illinois prison, though that is now a moot point.[122]

Thus the allegations by two administrations that courts can't handle some of these cases have been disproved by concrete evidence to the contrary, and by the military commission failures. This is no longer a philosophical, political, or legal debate. This is the real world.

Yet Congress ignored this reality in January 2011 by placing the President in the untenable position of having to sign needed defense legislation that contained a provision that prohibits the transfer of any Guantanamo detainees to the U.S. The President responded by issuing a signing statement contesting Congressional authority to limit his military related transfer power. The President, however, then essentially conceded defeat and issued a new executive order authorizing Guantanamo military commissions to go forward, as well as providing enhanced review procedures for those indefinitely detained.[123] Indeed, Attorney General Eric Holder announced on April 4, 2011 that military commission trials will now proceed at Guantanamo against the main September 11 conspirators.[124]

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[119] Posting of Deborah Pearlstein to OPINIO JURIS, http://opiniojuris.org/2010/02/15/the-politics-of-gitmo-2/ (Feb. 15, 2010, 16:17 PM) ("Among other things, after 8 years, the commissions have convicted 3 defendants, 2 of whom are already back on the streets. In the same time, according to NYU, the criminal justice system has pursued 800 terrorism prosecutions with a conviction rate of 90%.").

[120] *See* United States v. Salameh, No. S5 93 Cr. 0180 (KTD), 1993 WL 364486 (S.D.N.Y. Sept. 15, 1993), *aff'd* 152 F.3d 88 (2d Cir. 1998).

[121] *See, e.g.*, United States v. Smith, 780 F.2d 1102 (4th Cir. 1985) (ruling on the admissibility of classified information under the Classified Information Procedures Act). The *Salameh* case had to deal with these problems frequently. *See supra* note 116.

[122] Christi Parsons, *U.S. to House Guantanamo Detainees in Illinois, Officials Say*, L.A. TIMES, Dec. 15, 2009, *available at* http://articles.latimes.com/2009/dec/15/nation/la-na-guantanamo15-2009dec15.

Three important questions remain. First, are the federal courts now out of the picture entirely? Second, would using courts mean some deadly terrorists could be freed? Third do these recent cases show that the Supreme Court must use more aggressive judicial review during wartime than it has in the past?

A. Article III Judges

The President still has the ability to utilize the federal courts despite this new defense legislation. He can propose that Article III judges hear detainee trials at Guantanamo using federal court procedures, as Deborah Pearlstein and others have recently suggested.[125] Legislation would be needed but nothing prohibits this now. This would be the only way for the President to keep his campaign promise regarding the insufficiency of Guantanamo, and to ensure the proceedings fully meet constitutional and international law obligations. If necessary, perhaps senior federal judges could be called upon. There is a legal basis for Article III judges sitting outside the fifty United States. For example, there is a federal district court in Guam. Justice Robert Jackson served at Nuremburg. Though these are not exactly the same situations, strong U.S. Supreme Court rulings that Guantanamo is American soil, for habeas purposes, should suffice.

There would be some logistical problems to work out involving a jury, classified information, and other trial procedures but solutions exist. Defendants could agree to waive a jury trial in return for the Article III forum.[126] This would seem to be the only avenue left to solve the international stain that is Guantanamo given the new federal law.

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[123] Editorial, *The Prison That Won't Go Away*, N.Y. TIMES, Mar. 9, 2011, at A26.

[124] Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES, Apr. 4, 2001, at A1.

[125] Pearlstein, *supra* note 104.

B. *Unrepentant*

On May 28, 2010, the Obama Administration released to the public the Final Report of its Guantanamo Review Task Force, which was co-authored by several Cabinet Departments.[127] The Report was actually completed on January 22, 2010.[128] One conclusion was that:

> 48 detainees were determined to be too dangerous to transfer but not feasible for prosecution. They will remain in detention pursuant to the government's authority under the Authorization for Use of Military Force passed by Congress in response to the attacks of September 11, 2001. Detainees may challenge the legality of their detention in federal court and will periodically receive further review within the Executive Branch.[129]

Thus, these individuals could remain in detention indefinitely without trial.[130] This seems to be a serious violation of international law and should be considered a violation of constitutional law, especially given the incorrectness of the AUMF argument, shown by Justice

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[126] Though as Pearlstein points out, some detainees are getting good plea agreements at Guantanamo because of the Commissions. *Id.* But those pleas could decline if the commission prosecutors think the Obama commission rules make things less chaotic.

[127] Peter Finn, *Most Detainees Low-level Fighters; Guantanamo Report Task Force Advises 126 be Transferred*, WASH. POST, May 29, 2010, at A3, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/05/28/AR2010052803873.html?sub=AR&sid=ST2010052803890.

[128] *Id.*

[129] FINAL REPORT, GUANTANAMO REVIEW TASK FORCE, at ii (2010), *available at* http://media.washingtonpost.com/wp-srv/nation/pdf/GTMOtaskforcereport_052810.pdf?sid=ST2010052803890.

[130] *See id.*

Souter's concurrence in *Hamdi.*[131] Moreover, President Obama spoke out during the campaign against the Bush administration's position that the President has total unilateral power here, nor does a recent Supreme Court case on sex predators go so far.[132]

Unfortunately, the new Obama executive order does not ever require a trial, despite its improved procedural protections. Thus, the executive order still violates the rule of law for this nation, as well as presenting pragmatic problems.[133] Nothing seems less American, and more like a Gulag, than holding people in perpetuity.[134] In addition, supporters of maintaining Guantanamo virtually acknowledge that the goal is to ensure there are no releases. Take this statement from an article co-authored by Jack Goldsmith and Ben Wittes.[135] Indeed, what is to prevent this power from being used to hold other individuals throughout the world who are dangerous to the United States? What is to prevent other nations from using it against Americans?

It is also likely that most of these individuals have committed federal crimes, and can be prosecuted anyway, despite problems with tainted evidence, witness accessibility and the like.[136] These trials will probably take years anyway. Certainly, even innocent Guantanamo detainees are not being released quickly. The law of war simply cannot be invoked to justify these detentions when the war could go on forever.[137]

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[131] Hamdi v. Rumsfeld, 542 U.S. 507, 539-54 (2004) (Souter, J., concurring in judgment). Alfred de Zayas persuasively argues that indefinite detention violates Article 9 of the International Covenant on Civil and Political Rights. *Human Rights and Indefinite Detention*, 87 INT'L REV. OF THE RED CROSS 857, 15 (Mar. 2005). Regarding the constitutional violation, see McCormack, *supra* note 10.

[132] United States v. Comstock, 130 S. Ct. 1949, 1954 (2010).

[133] *See supra* note 123; *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 559-60 (2006) (finding international law and constitutional problems with novel "courts" for handling terror suspects"); Vladeck, *supra* note 74.

[134] *See* Richard Norton-Taylor, *Guantánamo is Gulag of Our Time, Says Amnesty*, GUARDIAN, May 26, 2005, at Foreign 15 (quoting an Amnesty International official).

[135] Jack Goldsmith & Benjamin Wittes, *Nuts and Deadbolts*, SLATE MAG., Dec. 8, 2008, http://www.slate.com/id/2206229 ("This conundrum gives the government an overwhelming incentive to use trials only when it is certain to win convictions and long sentences, and to place the rest in whatever detention system it creates.").

[136] *See* Pearlstein, *supra* note 119.

As a last resort, some acquitted or released detainees may have to be returned to their home countries or to where they were picked up.[138] A risk of recidivism exists, just as with other dangerous criminals who get out of prison. Yet, as several experts have pointed out, the idea that we can prevent all internationally antagonistic acts against us is a myth, especially if we don't want the rule of law to be a myth. In addition, holding them in a Gulag could foment more hostility abroad, and may even produce more terrorists in the long run.[139] For example, a few of those already released from Gitmo as harmless may have taken up arms against the U.S.,[140] but this may be partly due to their Gitmo mistreatment. Further, we can use our extensive military surveillance capabilities to track them since we will know where they were released. At least this way the U.S. maintains the constitutional traditions that it is supposedly fighting to preserve.

C. The Long Term

The U.S. Supreme Court's war on terror cases partly follow the tradition of being deferential to perceived military interests. Yet this has frequently led to deception. The most infamous example is *Korematsu*[141] where historians have shown that the government lied to the Court.[142] Similarly, one wonders about the Bush Administration's representations of Mr. Hamdi's dangerousness.[143] Then there was the Vietnam War, where reports about the Gulf of Tonkin incident that was used to justify American involvement, now seem false.[144] And one cannot forget that no weapons of mass destruction were found in Iraq despite the Bush Administration assurances that such weapons justified our invasion.

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[137] Joanne Mariner, *Criminal Justice Techniques are Adequate to the Problem of Terrorism*, BOSTON REV., Dec. 10, 2008, http://bostonreview.net/BR34.1/mariner.php (responding to article by David Cole).

[138] *See, e.g.*, Brinkley & Lichtblau, *supra* note 55.

[139] Gary LaFree & Gary Ackerman, *The Empirical Study of Terrorism: Social and Legal Research*, 5 ANN. REV. L. & SOC. SCI. 5, 347 (2009) ("Terrorism feeds on the ability of groups to portray governments and their agents as illegitimate.").

[140] *See* Tara Wall, *President Warns Against Releasing Gitmo Detainees*, WASH. TIMES, Jan. 16, 2009, at A1, *available at* http://www.washingtontimes.com/news/2009/jan/16/president-warns-against-releasing-gitmo-detainees (noting that, as of December 2008, the Pentagon estimates that sixty-one former detainees have returned to the battlefield after being released). These figures, however, are disputed. William Fisher, *Study Challenges Claims of Gitmo Recidivism*, ANTIWAR.COM, Feb. 5, 2009, http://www.antiwar.com/ips/fisher.php?articleid=14194 (quoting Seton Hall law professor who questions the Pentagon statistics). Moreover, some of the alleged recidivists were released precisely because they were perceived as not being dangerous based on their pre-Gitmo backgrounds.

Another troubling case of deference is *Rostker v. Goldberg*[145] where the Court upheld a ban on women registering for the draft. Registration of non-combatants would supposedly place an administrative burden on the military.[146] Yet this is puzzling since not everyone in the military needs to be fit for the front line.[147] A more lethal case is *Ex parte Quirin*[148] where the Court upheld summary executions of German saboteurs including one U.S. citizen. Even Justice Scalia said that case was not the Court's "finest hour" in his *Hamdi* dissent.[149] Finally, the Court in *Holder v. Humanitarian*

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[141] Korematsu v. United States, 323 U.S. 214 (1944).

[142] Claudia Luther, *Fred Korematsu, 86, Fought World War II Internment, Dies*, SEATTLE TIMES, Mar. 31, 2005, *available at* http://seattletimes.nwsource.com/html/nationworld/2002226476_webkorematsuobit31.html (discussing a 1944 Justice Department memo accusing the Solicitor General of "'lying to the Supreme Court'" about the threat of Japanese-Americans).

[143] *See* Brief for Respondents at 4–5, Hamdi v. Rumsfeld, 542 U.S. 507 (No. 03-6696), 2004 WL 724020.

[144] John Prados, *Essay: 40th Anniversary of the Gulf of Tonkin Incident*, NAT'L SECURITY ARCHIVE, Aug. 4, 2004, http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB132/essay.htm (last visited Aug. 30, 2010).

[145] Rostker v. Goldberg, 453 U.S. 57 (1981).

[146] *Id.* at 78-83.

[147] *See id.* at 83 (White, J., dissenting) ("I perceive little, if any, indication that Congress itself concluded that every position in the military, no matter how far removed from combat, must be filled, with combat-ready men.").

[148] *Ex parte* Quirin, 317 U.S. 1 (1942).

[149] Justice Scalia wrote of *Ex parte Quirin* that, "The Court upheld the [military] commission and denied relief in a brief per curiam issued the day after oral argument; a week later the Government carried out the commission's death sentence . . . . The Court eventually explained its reasoning in a written opinion issued several months later." Hamdi v. Rumsfeld, 542 U.S. 507, 569 (2004).

Law Project[150] largely ignored its traditional First Amendment rules that prohibit viewpoint discrimination. The Court generally upheld a law that prohibits the material support of so-called terrorist organizations, even where the support took the form of speech, encouraging a peaceful message.

By contrast, the following two Supreme Court military related opinions, where the Court acted vigorously, are frequently praised.[151] In *Youngstown Sheet & Tube Co. v. Sawyer*,[152] the Court overturned President Truman's seizure of the striking steel mills during the Korean War. The Court rejected Truman's Commander-in-Chief power assertion by labeling the case as a domestic matter.[153] Justice Jackson's famous concurrence also made the President's authority dependent on what Congress thought.[154] This is a rejection of anything like the Bush Administration's unitary executive theory.

In the "Pentagon Papers" case,[155] the Court rejected the government's arguments that newspaper publication would endanger national security. Admittedly, the Court has always been skeptical of prior restraints.[156] But there were enough dissenters accepting the government's representations to show the courage of the majority's authors.[157]

These few cases cannot conclusively prove that the Supreme Court should never defer to the military in wartime cases. Yet they support the idea that the Court has a serious role to play.[158] The government's temptation to falsify information when national security is supposedly at stake is simply too tempting. Martin Flaherty has also shown that such falsification has occurred in numerous foreign countries battling terrorism, such as with the United Kingdom's infamous actions against the Irish Republican Army.[159] Courts simply have to monitor the executive, concerns about political backlash notwithstanding. The U.S. Supreme Court and the Constitution should not disappear during wartime,[160] unlike the icy weapon used in some mystery novels. Moreover, the Court should answer key questions with specificity to provide the necessary guidance to protect civil liberties.

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[150] 130 S. Ct. 2705 (2010).

[151] Walter Dellinger, *Still "The Most Important Decision on Presidential Power Ever,"* SLATE MAG., June 30, 2006, http://www.slate.com/id/2144476 (describing "landmark" nature of Youngstown decision).

[152] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[153] *Id.* at 587.

[154] *Id.* at 635-38 (Jackson, J., concurring).

[155] N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (papers showed the government had lied to the public about the Vietnam War).

[156] *See, e.g.*, Near v. Minn. *ex rel* Olson, 283 U.S. 697, 733 (1931) ("[E]very man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint . . . .").

[157] *See N.Y. Times Co.*, 403 U.S. at 748-52 (Burger, C.J., dissenting); *id.* at 752-59 (Harlan, J., dissenting); *id.* at 759-63 (Blackmun, J., dissenting).

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[158] This is one of the basic points of Professor Geoffrey Stone's award winning book. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004).

[159] Flaherty, *supra* note 74, at 77.

[160] Justice Kennedy recently told the Ninth Circuit Judicial Conference that Article III courts should be the preferred forum for terrorism cases. Associated Press, *Justice Anthony Kennedy Favors Civilian Courts in Terrorism Cases*, Aug. 20, 2010, *available at* http://www.cnsnews.com/news/article/71373.

THOSE WHO CAN'T, TEACH: WHAT THE LEGAL CAREER OF JOHN YOO TELLS US ABOUT WHO SHOULD BE TEACHING LAW

Lawrence Rosenthal[*]

Perhaps no member of the legal academy in America is more controversial than John Yoo. For his role in producing legal opinions authorizing what is thought by many to be abusive treatment of detainees as part of the Bush Administration's "Global War on Terror,"[1] some have called for him to be subjected to professional discipline[2]; others have called for his criminal prosecution.[3] I aim to raise a different question—whether John Yoo—and his like—ought to be teaching law. Thus far, consideration of this question has been confined to rather brief essays in the popular press.[4] In the academy, there has been little disagreement voiced with the view of Christopher Edley, Professor Yoo's dean at the University of California at Berkeley's School of Law, who, after noting that Professor Yoo "enjoys not only security of employment and academic freedom, but also First Amendment and Due Process rights," concluded: "Assuming one believes as I do that Professor Yoo offered bad ideas and even worse advice during his government service, that judgment alone would not warrant dismissal or even a potentially chilling inquiry."[5] I will offer a different view.

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[*] Professor of Law, Chapman University School of Law. I am indebted to John Hall, Ernesto Hernandez, Dan Kahan, Michael Lang, Arnold Loewy, Gowri Ramachandran, Richard Redding, Robin Wellford Slocum, Russell Weaver and the participants at the Criminal Procedure Discussion Forum held in Aix-en-Provence, France, on June 9 and 20, 2010, for enormously helpful comments on prior drafts. I must also thank Zachariah Moura, Isa Lang, and the staff of the Chapman University School of Law's Rinker Law Library for enormously capable research assistance. This article had its genesis in a brief essay I previously published while the investigation into Professor Yoo's conduct during his service in the United States Department of Justice was still ongoing. *See* Lawrence Rosenthal, *Lowering the Bar? John Yoo Shouldn't Be Teaching, Based on His Memos*, L.A. TIMES, Apr. 9, 2009, § Main, at 31. To the extent that this article is understood as critical of the University of California at Berkeley's School of Law for continuing to employ Professor Yoo, candor compels me to acknowledge that Professor Yoo was a visiting professor at my own institution during the spring semester of 2009. A draft of this article was sent by email to John Yoo and Robert Delahunty with an invitation for their comments. Professor Yoo declined to comment. Professor Delahunty did not respond to the email.

[1] The phrase "Global War on Terror" was eventually adopted by the Bush Administration as a label for its efforts to combat international terrorism. *See* Scott Wilson & Al Kamen, *"Global War on Terror" Is Given New Name: Bush's Phrase Is Out, Pentagon Says*, WASH. POST, Mar. 25, 2009, at A4.

[2] *See, e.g.*, Jose E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 215-21 (2006); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SECURITY L. & POL'Y 455, 463-69 (2005); George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. NAT'L SECURITY L. & POL'Y 409, 431-41 (2005); Robert C. Power, *Lawyers and the War*, 34 J. LEGAL PROF. 39, 77-89 (2009); Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN.

John Yoo provides something of a case study in the problems in legal education today. As a scholar, Professor Yoo is considered something of a superstar; he has been described as "a leading scholar on the relationship of international law and war powers to constitutional commands."[6] Even so, he teaches at a law school—an entity engaged in preprofessional education. Prior to tenure in the Bush Administration, Professor Yoo had little experience in the practice of the law; as we will see,

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L. REV. 409, 439-44 (2011); Michael E. Tigar, *What Lawyers, What Edge?*, 36 HOFSTRA L. REV. 521, 536-37 (2007).

[3] *See* Erwin Chemerinsky, *Civil Liberties and the War Terror: Seven Years after 9/11 History Repeating: Due Process, Torture and Privacy During the War on Terror*, 62 SMU L. REV. 3, 12 (2009); Claire Finkelstein, *Vindicating the Rule of Law: Prosecuting Free Riders on Human Rights*, *in* WHEN GOVERNMENTS BREAK THE LAW: THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION 37, 49-64 (Austin Sarat & Nasser Hussain eds., 2010); Joseph Lavitt, *The Crime of Conviction of John Choon Yoo: The Actual Criminality in the OLC During the Bush Administration*, 62 ME. L. REV. 155, 174-91 (2010); Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347, 356-61 (2007); Jeanne Mirer, *The Law of Torture and Accountability of Lawyers Who Sanction It*, *in* THE UNITED STATES AND TORTURE: INTERROGATION, INCARCERATION, AND ABUSE 241, 249-52 (Marjorie Cohn ed., 2011); Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT'L L.J. 193, 193 (2010).

[4] *See, e.g.*, Paul Campos, Editorial, *A Tortured Defense*, DENVER ROCKY MOUNTAIN NEWS, Apr. 16, 2008, at 31; Rosenthal, *supra* note *.

[5] Christopher Edley, Jr., *The Torture Memos and Academic Freedom*, Apr. 10, 2008, *available at* http://www.law.berkeley.edu/news/2008/edley041008.html.

[6] Panel Discussion, *The Framers' Understanding of Originalism and International Law*, 11 CHAP. L. REV. 307, 308 (2008) (remarks of Ronald A. Cass).

this makes him typical of the current generation of legal educators. Professor Yoo also represents something of a natural experiment of a type that we rarely see—the unusual case of a leading legal scholar with the limited professional experience typical of his generation who leaves the academy and practices law on a regular basis. When Professor Yoo actually practiced law, however, he made quite a hash of things. To use Dean Edley's characterization, Professor Yoo's time in legal practice produced "bad ideas and even worse advice." No medical school would employ an incompetent physician to teach the practice of medicine; such a teacher would surely be thought a menace to the professional development of its students, and to their future patients as well. Surely it is remarkable that the legal academy could regard as something of a superstar an individual who proves unable to practice—at least at an acceptable level—the profession for which he is training his students. Professor Yoo's case is unusual in that he took the rare step of leaving the academic cocoon and venturing into a position where his professional deficiencies were likely to be exposed, but there is reason to believe that his lack of professional judgment is common among the scholars of his generation. All of this suggests that there is something deeply wrong with the state of legal education today.

In the discussion that follows, I will first illustrate the deficiencies in the legal work of Professor Yoo during his service in the Department of Justice. I will then explain why those deficiencies cast grave doubt on Professor Yoo's qualifications to teach law. Dean Edley's view, I will argue, has no proper place in preprofessional education. Indeed, the premises underlying Dean Edley's view illustrate a good deal of what is wrong with legal education today.

I. THE LEGAL WORK OF JOHN YOO

According to Professor Yoo's faculty profile, prior to the time that he joined the United States Department of Justice as Deputy Assistant Attorney General for the Office of Legal Counsel ("OLC") in the administration of President George W. Bush, Professor Yoo's sole experience in the practice of law consisted of a stint in 1995-96 as counsel to the Senate Judiciary

Committee.[7] Legislative counseling work is, of course, of an entirely different character than advising a client on compliance with the law. It appears that the first actual client Professor Yoo ever counseled in his legal career was the President of the United States.

A. *The Torture Memo*

Most criticism of Professor Yoo has focused on his role in producing an August 1, 2002 memorandum—popularly known as the "Torture Memo," exploring the reach of the federal anti-torture statute.[8] Although the memorandum was signed by Assistant Attorney General Jay Bybee, then-Deputy Assistant Attorney General Yoo's supervisor, it appears that Professor Yoo was its primary author and that Assistant Attorney General Bybee did not undertake substantial revision of the draft.[9] Among legal scholars, "the memorandum was roundly, almost uniformly condemned,"[10] often in terms unusually harsh for academics.[11]

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[7] *See* Berkeley Law Faculty Profiles, http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=235 (last visited Mar. 30, 2011).

[8] *See* David Cole, *Introductory Commentary: Torture Law*, *in* THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE 1, 20-24 (David Cole ed. 2009) (providing a critical overview of the memo) [hereinafter THE TORTURE MEMOS].

[9] *See* OFF. OF PROF. RESP., U.S. DEP'T OF JUSTICE, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 43-62 (July 29, 2009), *available at* http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf [hereinafter OPR REPORT]. According to Assistant Attorney General Bybee's successor, Bybee "tended to approve Yoo's draft opinions on these topics with minimal critical input." JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 169 (2007). In addition, Professor Yoo subsequently signed another memorandum reiterating the view taken in the Torture Memo. *See* Memorandum for William J. Haynes II, Gen. Counsel, Dep't of Def., from John C. Yoo, Deputy Assistant Att'y Gen., *Military Interrogation of Alien Unlawful Combatants Held Outside the United States*, Mar. 14, 2003, at 18-19, 36-47, 74-81 *available at* http://www.justice.gov/olc/docs/memo-combatantsoutsideunitedstates.pdf [hereinafter Military Interrogation Memo]. After leaving government service, Professor Yoo continued to defend the memorandum. *See, e.g.*, *From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules (Part III): Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 11 (2008) (statement of John Yoo); JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 169-87 (2006).

1. The reach of the anti-torture statute

The anti-torture statute provides:

> Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.[12]

The statute defines "torture" as "an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."[13] The Torture Memo, after noting that the statute does not define "severe physical pain," and acknowledging that "[t]he dictionary defines 'severe' as '[u]nsparing in exaction, punishment or censure' or '[I]nflicting discomfort or pain hard to endure; sharp; afflictive, distressing; violent; extreme; as *severe* pain, anguish, torture,"[14] nevertheless looked to "statutes defining an emergency medical condition for the purpose of providing health benefits" and concluded that to constitute "severe physical pain" for purposes of the anti-torture statute, pain inflicted during interrogation "must rise to . . . the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of bodily functions—in order to constitute torture."[15]

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[10] M. Katherine B. Darmer, *Waterboarding and the Legacy of the Bybee-Yoo "Torture and Power" Memorandum: Reflections from a Temporary Yoo Colleague and Erstwhile Bush Administration Apologist*, 12 CHAP. L. REV. 639, 640 (2009).

[11] *See, e.g.*, David Cole, *The Idea of Humanity: Human Rights and Immigrants' Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 636 (2006) ("a truly astounding opinion"); Kent Greenfield, *Attorney General Mukasey's Defense of Irresponsibility*, 32 B.C. INT'L & COMP. L. REV. 223, 227 (2009) ("We understand that the legal arguments advanced in the Torture Memo were blatantly wrong."); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1578 (2007) ("The Torture Opinion is an easy target for criticism, an extreme example of poor lawyering."); Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1, 35 (2008) ("Yoo's guidance failed basic tests of sound lawyering . . . ."); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1231 (2006) ("[T]he Bybee memorandum has been withered by criticism for the poor quality of its legal analysis."); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1708 (2005) ("The quality of Bybee's legal work is a disgrace . . . ."); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 70 (2005) ("[T]he process of providing legal advice was so badly flawed, and the lawyers working on the memos were so fixated on working around legal restrictions on the administration's actions, that the legal analysis became hopelessly distorted.").

[12] 18 U.S.C. § 2340A(a) (2006).

[13] § 2340(1).

The best explanation for the deficiencies in this approach came from the Bush Administration itself in a 2004 OLC opinion that repudiated the definition of "severe pain" in the Torture Memo:

> The August 2002 Memorandum also looked to the use of "severe pain" in certain other statutes, and concluded that . . . pain "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." We do not agree with those statements. Those other statutes define an "emergency medical condition," for purposes of providing health benefits . . . . They do not define "severe pain" even in that very different context (rather, they use it as an indication of an "emergency medical condition"), and they do not state that death, organ failure, or impairment of bodily function cause "severe pain," but rather that "severe pain" may indicate a condition that, if untreated, could cause one of those results. We do not believe that they provide a proper guide for interpreting "severe pain"

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[14] Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Att'y Gen., *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, Aug. 1, 2002, *in* THE TORTURE MEMOS, *supra* note 8, at 41, 46-47 (italics and second and third brackets in original) [hereinafter Torture Memo].

[15] *Id.* at 47 (internal citations omitted); *accord* Military Interrogation Memo, *supra* note 9, at 38-39.

> in the very different context of the prohibition against torture . . . .[16]

In other words, the statutes to which the Torture Memo looked to define "severe pain" did not in fact define "severe pain." That seems a pretty serious deficiency in legal analysis.[17]

Although the Torture Memo's definition of "severe pain" has been the focus of most of the critical commentary about its reading of the anti-torture statute,[18] perhaps even more significant was its conclusion that although the statute defines "torture" disjunctively as severe "pain or suffering," the statutory terms "pain" and "suffering," according to the Torture Memo, "are not distinct concepts."[19] This move was critical; without it, even the restrictive definition of "severe physical pain" would not have dramatically narrowed the statute, since the infliction of pain that is unlikely to compromise bodily functions could still produce "severe suffering" and therefore amount to "torture" within the meaning of the statute. But, because the memo opined that the term "suffering" added nothing to the statute, the restrictive definition of "severe pain" became controlling.

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[16] Memorandum for James B. Comey, Deputy Att'y Gen., from Daniel Levin, Acting Assistant Att'y Gen., *Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A*, Dec. 30, 2004, *in* THE TORTURE MEMOS, *supra* note 8, at 128, 137-38 n.17 [hereinafter Levin Torture Memo].

[17] About the best that can be said of this portion of the memo is the observation of Deputy Associate Attorney General David Margolis in his review of the Office of Professional Responsibility's finding that Yoo and Bybee were guilty of professional misconduct:

> [T]he memo does not define "severe pain" as strictly limited to incidents resulting in organ failure or death. Rather, the memo advised that severe pain must rise to a "similarly high level," . . . and that victims must suffer pain that is "*of the kind* that is *equivalent to* the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant bodily function will likely result." These qualifiers do not help much and could have been clearer, but the memo read carefully does not authorize interrogators to engage in any behavior that does not *in fact* cause serious physical injury, organ failure, or death.

Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists, from David Margolis, Assoc. Deputy Att'y Gen., Jan. 5, 2010, at 33, *available at* http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf (emphasis in original) (citations omitted) (quoting Torture Memo, *supra* note 14, at 47, 56-57) [hereinafter Margolis MoD].

[18] *See, e.g.*, DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 178-79 (2007); JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER 89-91 (2006); PETER MARGULIES, LAW'S DETOUR: JUSTICE DISPLACED IN THE BUSH ADMINISTRATION 60 (2010); OPR REPORT, *supra* note 9, at 176-84; Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1150 (2006); Brad R. Roth, *Just Short of Torture: Abusive Treatment and the Limits of International Criminal Justice*, 6 J. INT'L CRIM. JUST. 215, 215-16 (2008); Waldron, *supra* note 11, at 1707-08; Wendel, *supra* note 11, at 80-82.

The conclusion that the words "or suffering" added nothing to the statutory definition of "torture" is, if anything, even less defensible then the Torture Memo's definition of "severe pain." Reading the phrase "severe pain or suffering" to mean the same thing as "severe pain" is inconsistent with the familiar rule that every term in a statute is presumed to have independent meaning.[20] To be sure, this is only a presumption, but there is little reason to think it inapplicable to this context. Given the restrictive definition of "severe physical pain" adopted by the Torture Memo, it should have been especially clear that the statutory phrase "severe physical suffering" has an independent meaning not involving organ failure or its like. For its part, the Torture Memo offers no explanation for how the phrase "severe suffering" necessarily requires some threat of death, organ failure, or comparable impairments of bodily functions. Indeed, after Professor Yoo's departure from government service, the Bush Administration's OLC repudiated this aspect of the Torture Memo as well, concluding in a subsequent legal opinion that the statutory concepts of "pain" and "suffering" are distinct.[21]

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[19] Torture Memo, *supra* note 14, at 47 n.3; *accord* Military Interrogation Memo, *supra* note 9, at 39 n.47.

[20] *See, e.g.*, United States v. Wells, 519 U.S. 482, 493 n.14 (1997); Bailey v. United States, 516 U.S. 137, 145-46 (1995); Ratzlaf v. United States, 510 U.S. 135, 140-41 (1994).

[21] *See* Levin Torture Memo, *supra* note 16, at 141.

The statutory definition of "torture" is not limited to physical pain and suffering; it also includes "severe mental pain or suffering," defined as

> the prolonged mental harm caused by or resulting from—
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (C) the threat of imminent death; or
>
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.[22]

Under this definition, the Torture Memo's restrictive definition of "severe physical pain or suffering" proved to be doubly significant, since the first subparagraph of this definition requires a threat of "severe physical pain or suffering" which, as we have seen, was considerably narrowed by the Torture Memo. The memorandum further narrowed "mental pain or suffering" by stressing that mental harm must be "prolonged" and that this result must be specifically intended before the statute is violated.[23]

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[22] 18 U.S.C. § 2340(2) (2006).

[23] *See* Torture Memo, *supra* note 14, at 49-51; *accord* Military Interrogation Memo, *supra* note 9, at 39-44. The memo's use of the concept of specific intent was itself confusing. It states:

> In order for a defendant to have acted with specific intent, he must expressly intend to achieve the forbidden act . . . . Here, because [the anti-torture statute] requires that a defendant act with the specific intent to inflict severe pain, the infliction of such pain must be the defendant's precise objective.

Id. at 44; *accord* Military Interrogation Memo, *supra* note 9, at 36-38. This formulation, though hardly a model of clarity, implies that if an actor's objective is to obtain information or protect national security, the actor lacks the requisite specific intent. In fact, The effect of the restrictive definition of torture contained in the Torture Memo on interrogation practices is illustrated by another OLC memorandum, signed on the same day as the Torture Memo, discussing the interrogation techniques that the Central Intelligence Agency proposed for use on Abu Zubaydah, "one of the highest ranking members of the al Qaeda terrorist organization."[24] Professor Yoo was the primary author of the Interrogation Techniques Memo, which was not substantially revised by Assistant Attorney General Bybee.[25] Among other interrogation techniques, the Interrogation Techniques Memo considered the use of the "waterboard," in which, as described in the memo,

> the individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual's feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in the carbon dioxide level in the individual's blood. This increase in the carbon dioxide level stimulates increased effort to breathe. This effort plus the cloth

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it has long been settled that the concept of specific intent requires only that the actor's objective was to engage in the prohibited conduct and not that the actor intended to violate the law. *See, e.g.*, United States v. Feola, 420 U.S. 671, 687-89 (1975). The OLC subsequently retracted the account of specific intent found in the Torture Memo, *see* Levin Torture Memo, *supra* note 16, at 150 n.27, and added:

> [S]pecific intent must be distinguished from motive. There is no exception under the statute permitting torture to be used for a 'good reason.' Thus, a defendant's motive (to protect national security, for example) is not relevant to the question whether he has acted with the requisite specific intent under the statute.

Id. at 150. For a useful discussion of specific intent under the statute, see Dana Carver Boehm, *Waterboarding, Counter-Resistance, and the Law of Torture: Articulating the Legal Underpinnings of U.S. Interrogation Policy*, 41 U. TOL. L. REV. 1, 33-37 (2009).

[24] Memorandum for John Rizzo, Acting Gen. Counsel of the Central Intelligence Agency, from Jay S. Bybee, Assistant Att'y Gen., *Interrogation of al Qaeda Operative*, Aug. 1, 2002, *in* THE TORTURE MEMOS, *supra* note 8, at 106, 106 [hereinafter Interrogation Techniques Memo].

[25] *See* OPR REPORT, *supra* note 9, at 55-62.

> produces the perception of "suffocation and incipient panic," i.e., the perception of drowning.[26]

Under the restrictive definition of "severe physical pain or suffering" adopted in the Torture Memo, the Interrogation Techniques Memo had little trouble reconciling waterboarding with the statute. Waterboarding did not inflict "severe physical pain or suffering," according to the Interrogation Techniques Memo, because it is not painful:

> As we understand it, when the waterboard is used, the subject's body responds as if the subject were drowning—even though the subject may be well aware that he is in fact not drowning. You have informed us that this procedure does not inflict actual physical harm. Thus, although the subject may experience the fear or panic associated with the feeling of drowning, the waterboard does not inflict physical pain. As we explained in the [Torture] Memorandum, "pain and suffering" as used in [the statute] is best understood as a single concept, not distinct concepts of "pain" as distinguished from "suffering." The waterboard, which inflicts no pain or actual harm whatsoever, does not, in our view inflict severe pain or suffering.[27]

Accordingly, the memo's assessment of waterboarding was based on the Torture Memo's erroneous conflation of "severe pain" and "severe suffering."

To be sure, the memo offered a fallback:

> Even if one were to parse the statute more finely to attempt to treat "suffering" as a distinct concept, the waterboard could not be said to inflict severe suffering. The waterboard is simply a controlled acute episode, lacking the connotation of a protracted period of time generally given to suffering.[28]

This represents yet another error of legal analysis; the Interrogation Techniques Memo injects a temporal requirement into the concept of "severe physical suffering," although the statutory definition of "torture" requires only that "mental pain or suffering" be "prolonged." A familiar rule of statutory construction provides that the inclusion of limiting language in one portion of a statute implies the absence of similar limitation elsewhere.[29]

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[26] Interrogation Techniques Memo, *supra* note 24, at 109.

[27] *Id.* at 118 (footnote omitted).

[28] *Id.*

Thus, the errors in this portion of the Interrogation Techniques Memo were serious. If the statute were correctly interpreted to mean that "severe physical suffering" amounts to torture even if not painful, and to reject a requirement that physical suffering be "prolonged" since that qualifier appears only in the definition of "severe mental pain or suffering," the argument in the Torture Memo that waterboarding is consistent with the anti-torture statute collapses. Although the Torture Memo opined that "it is difficult to conceive of [severe physical] suffering that would not involve severe physical pain,"[30] that observation takes no account of waterboarding which, as the Interrogation Techniques Memo reflects, the authors of the Torture Memo knew was a technique that would be permitted by virtue of the analysis in that memo. It is surely reasonable to believe that a jury might find that waterboarding, in which (to use the Interrogation Techniques Memo's description) "the subject's body responds as if the subject were drowning," causing the subject to experience "the fear and panic associated with the feeling of drowning," inflicts "severe physical suffering." If so, waterboarding would satisfy the definition of "torture." That waterboarding is thought not to be painful could not be dispositive in light of the suffering induced by the physical sensation of drowning. To conclude otherwise would mean that submerging to the point of drowning a detainee who refused to provide information would not qualify as torture even though there is a longstanding concept of water torture in American law involving just this type of conduct.[31] To be sure, as we have seen, a violation of the anti-torture statute also requires that the defendant specifically intended to produce "severe physical suffering," but since specific intent requires only that an actor intend to produce the prohibited result, regardless of the actor's motivation or belief in the legality of his conduct,[32] an interrogator's intention to produce the "fear and panic associated with the feeling of drowning" in order to obtain information from a detainee would be sufficient to violate the statute.

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[29] *See, e.g.*, Bates v. United States, 522 U.S. 23, 29-30 (1997); Russello v. United States, 464 U.S. 16, 22-23 (1983).

[30] Torture Memo, *supra* note 14, at 47 n.3.

[31] *See* Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468 (2007). To be sure, Deputy Associate Attorney General Margolis concluded that the failure to discuss this history did not expose the authors of the Torture Memo to professional discipline given that none of

As for "prolonged mental pain or suffering," although the Interrogation Techniques Memo acknowledged that waterboarding amounted to "a threat of imminent death,"[33] it indicated that no prolonged mental harm was anticipated "[b]ased on . . . research into the use of these methods at SERE [Survival, Evasion, Resistance and Escape—the Navy's survival training program] school and consultation with others with expertise in the field of psychology and interrogation."[34] This conclusion required a good deal of credulousness. One need not be an expert in psychology to question whether the experiences of those who undergo waterboarding during military training fairly reflect the psychological reaction of detainees who are waterboarded by their captors as part of an all-too-real interrogation. In fact, the CIA's Office of Medical Services later stated that when the CIA presented its position on waterboarding to the OLC, "the expertise of the SERE psychologist/interrogators on the waterboard was probably misrepresented at the time, as the SERE waterboard experience is so different from the sub-

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the precedents involved the anti-torture statute or precisely the same technique as was employed by the CIA, although acknowledging that these examples "may have provided useful historical context." Margolis MoD, *supra* note 17, at 61. It is also worth noting that American history reflects some willingness to tolerate conduct that might well be considered torturous. *See* JOHN T. PARRY, UNDERSTANDING TORTURE: LAW, VIOLENCE, AND POLITICAL IDENTITY 135-64 (2010). Even so, this history surely sheds some light on the question whether "severe physical suffering" can occur in the absence of physical pain. Presumably, if water torture involving the sensation of drowning was not regarded as involving either severe physical pain or severe physical suffering, it would not be regarded as torture, yet history does not bear this observation out.

[32] *See supra* note 23.

[33] Interrogation Techniques Memo, *supra* note 24, at 123.

[34] *Id.*

sequent Agency usage as to make it irrelevant."[35] One wonders why this elementary point was not evident to Deputy Assistant Attorney General Yoo and his colleagues; the point did not escape their successor at OLC, who cautioned that "the very different situations of detainees undergoing interrogation and military personnel undergoing training counsels against undue reliance on the experience in SERE training."[36]

2. Defenses for torture

The Torture Memo went on to opine that even if interrogators committed acts of unlawful torture—in other words, in the argot of the memo, they specifically intended to cause the equivalent of organ failure or its equivalent or long-lasting mental trauma, "[i]t appears to us that under the current circumstances the necessity defense could be successfully maintained in response to an allegation of a [statutory] violation."[37] The memo elaborated:

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[35] INSPECTOR GENERAL, CENTRAL INTELLIGENCE AGENCY, SPECIAL REVIEW: COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPT. 2001-OCT. 2003), at 21-22 n.26 (May 7, 2004), *available at* http://documents.nytimes.com/ c-i-a-reports-on-interrogation-methods#p=1 [hereinafter IG REPORT].

[36] Memorandum for John A. Rizzo, Senior Deputy Gen. Counsel, CIA, from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., *Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of High Value Al Qaeda Detainee*, May 10, 2005, *reprinted in* THE TORTURE MEMOS, *supra* note 8, at 152, 169 n.18 [hereinafter Bradbury Interrogation Techniques Memo]. The United States Department of Justice's Office of Professional Responsibility was highly critical of the Interrogation Techniques Memo for its reliance on the experience of SERE training. *See* OPR REPORT, *supra* note 9, at 235-36. Reviewing that conclusion, Associate Deputy Attorney General Margolis was only a bit more charitable:

> The SERE training—despite its differences with real world application of the waterboard—would be relevant to the threshold question of whether everyone subjected to the waterboard suffers severe mental pain or suffering . . . . The memo continued, however, to attribute too much significance to the SERE training when it stated, "The continued use of these methods without mental health consequences to the trainees indicated that it is highly improbable that such consequences would result here." The memo would more correctly have observed that [a detainee]'s psychological assessment, combined with the SERE experience and the CIA's intention to have medical experts monitor the interrogation, made it highly improbable that [the detainee] would suffer mental health consequences. As drafted, however, the memo could be interpreted as concluding that the SERE experience alone virtually eliminated the need for an individualized assessment.

Margolis MoD, *supra* note 17, at 62-63 (citation omitted) (quoting Interrogation Techniques Memo, *supra* note 24, at 126).

> [T]wo factors will help indicate when the necessity defense could appropriately be invoked. First, the more certain that government officials are that a particular individual has information needed to prevent an attack, the more necessary interrogation will be. Second, the more likely it appears to be that a terrorist attack is likely to occur, and the greater the amount of damage expected from such an attack, the more that an interrogation to get information would become necessary.[38]

In this discussion of the necessity defense, however, the Torture Memo did not mention that the Supreme Court had recently questioned whether a necessity defense exists under federal law,[39] or the Court's square holding in the same case that no necessity defense could be recognized for the use of marijuana for medicinal purposes because "the Controlled Substances Act . . . reflects a determination that marijuana has no medical benefits worthy of an exception (outside the confines of a Government-approved research project)."[40] On similar reasoning, one could conclude that the anti-torture statute itself represents a judgment that torture has no intelligence-gathering benefits worthy of an exception from an unqualified statutory prohibition.

Instead, albeit without mentioning the recent medical marijuana case, the Torture Memo argued that the anti-torture statute had preserved the necessity defense because although the Convention Against Torture expressly included in its definition of "torture" the infliction of severe physical or mental pain or suffering for the purpose of obtaining information,[41] the

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[37] Torture Memo, *supra* note 14, at 92.

[38] *Id.* at 92-93; *accord* Military Interrogation Memo, *supra* note 9, at 74.

[39] *See* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 490 (2001).

[40] *Id.* at 491.

[41] Under the Convention Against Torture, "torture" is defined as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a

anti-torture statute does not contain similar language.[42] This reasoning is deeply flawed. For one thing, the anti-torture statute unqualifiedly prohibits all torture under color of law regardless of motive. The logical inference is that Congress had concluded that the motive for torture under color of law was irrelevant; torture could never have an acceptable justification. For another, the anti-torture statute was enacted to implement the obligations of the United States under the Convention Against Torture,[43] as the memo acknowledged.[44] It is difficult to believe that the statute was intended to be narrower in scope than the treaty that it implemented. Yet, on this point, the Convention is quite unequivocal; it also provided that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture"[45] and that "[a]n order from a superior office or a public authority may not be invoked as a justification of torture."[46] In its consideration of the treaty, the Senate explicitly acknowledged the import of these treaty obligations.[47] Thus, both the language of

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> third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Convention Against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment, art. 1, ¶ 1, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 112.

[42] *See* Torture Memo, *supra* note 14, at 93 & n.23; *accord* Military Interrogation Memo, *supra* note 9, at 76.

[43] *See* S. REP. NO. 103-107, at 58-59 (1993).

[44] *See* Torture Memo, *supra* note 14, at 58.

[45] Convention Against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment, art. 2, ¶ 2, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 112.

[46] *Id.* art. 2, ¶ 3.

[47] *See* S. EXEC. REP. NO. 101-30, at 7 (1990). Although the Senate articulated a number of reservations, understandings, and declarations in connection with ratification, none related to the Convention's prohibition on torture for the purpose of obtaining information. *See* 136 CONG. REC. 36, 192-99 (1990). In fact, the Reagan Administration had conveyed to the Senate an understanding that the Convention would preserve common-law defenses including self defense and defense of others, *see* S. EXEC. REP. NO. 101-30, at 16; the first Bush Administration deleted that understanding and acknowledged that the Convention prohibited torture even when undertaken in defense of self or others. *See id.* at 40-41.

the statute and the treaty it implemented cast great doubt on the availability of a necessity defense. Yet, the enormous legal risk associated with a defense of necessity in a prosecution under the anti-torture statute is nowhere disclosed in the Torture Memo.

Even if the Torture Memo correctly concluded that a necessity defense would be recognized to a charge of torture, however, it was less than clear about a central limitation of the defense that had led the Supreme Court to reject proffered necessity and duress defenses in a case involving a prison escape:

> Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm, the defense will fail. Clearly, in the context of prison escape, the escapee is not entitled to claim a defense of duress or necessity unless and until he demonstrates that, given the imminence of the threat, violation of [the prison escape statute] was his only reasonable alternative.[48]

Thus, to present a necessity defense, interrogators would have to demonstrate not only that a detainee had information about an impending attack, but also that interrogators could not reasonably expect success with any lawful means of interrogation.[49] At best, however, the Torture Memo makes this point only indirectly by noting "the defendant cannot rely upon the necessity defense if a third alternative is open and known to him that will cause less harm."[50] A client might well fail to appreciate the critical significance of this rather ambiguous and brief observation.[51]

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[48] United States v. Bailey, 444 U.S. 394, 410-11 (1980) (footnote omitted) (citation omitted) (internal quotation marks omitted).

[49] In this connection, it should be noted that the CIA's Inspector General found that the CIA often lacked an objective basis for determining whether detainees were withholding pertinent information when deciding whether coercive methods of interrogation were warranted. *See* IG REPORT, *supra* note 35, at 83-85. The Inspector General also found that it was difficult to assess the efficacy of enhanced interrogation techniques such as waterboarding and that even CIA officials disagreed on whether its use was warranted. *See id.* at 88-91.

[50] Torture Memo, *supra* note 14, at 92.

The Torture Memo also observed that "[t]he doctrine of self-defense permits the use of force to prevent harm to another person" and concluded that "a defendant accused of violating [the anti-torture statute] could have, in certain circumstances, grounds to properly claim the defense of another."[52] This portion of the memo acknowledged that "the defendant's belief in the necessity of using force must be reasonable" and that "many legal authorities include the requirement that a defender reasonably believe that the unlawful violence is 'imminent' before he can use force in his defense,"[53] but suggested that the imminence requirement "may be another way of expressing the requirement of necessity" by reference to

> a well known hypothetical, if A were to kidnap and confine B, and then tell B he would kill B one week later, B would be justified in using force in self-defense . . . . while the attack itself is not imminent, B's use of force becomes immediately necessary whenever he has an opportunity to save himself from A.[54]

Whatever the utility of this hypothetical, it plainly has no application to detainees who are continuously in custody and available for interrogation; it should be apparent that they may not be subject to unlawful interrogation techniques unless and until an interrogator reasonably believes that an attack is imminent and that there is no lawful alternative for preventing the attack.[55] Again, however, the Torture Memo, at best, acknowledges this limitation on the defense on the right of defense in a highly indirect and unsatisfactory fashion. Nor, for that matter, was the client apprised of the risk that the enactment of the anti-torture statute would be understood to eliminate the doctrine of self-defense or defense of others as a defense to torture for the same reasons that the statute might have foreclosed reliance on the common-law necessity defense.

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[51] For a more elaborate discussion of the problems with presenting a defense of necessity to a charge under the anti-torture statute, see John Alan Cohan, *Torture and the Necessity Doctrine*, 41 VAL. U. L. REV. 1587 (2007).

[52] Torture Memo, *supra* note 14, at 94, 96.

[53] *Id.* at 95.

[54] *Id.; accord* Military Interrogation Memo, *supra* note 9, at 78.

[55] In this regard, the CIA's Inspector General found that although interrogation of detainees disclosed the existence of a number of terrorist plots of which the CIA was previously unaware, "[t]his review did not uncover any evidence that these plots were imminent." IG REPORT, *supra* note 35, at 88. That should be unsurprising; once a conspirator is taken into custody, coconspirators are likely to presume that the detainee may have cooperated with interrogators and will therefore abandon plans of which the

Perhaps unsurprisingly, in subsequent OLC memoranda, the Bush Administration withdrew the analysis of necessity and self-defense in the Torture Memo and placed no reliance on these defenses as legal safe harbors for violations of the torture statute.[56]

Beyond all this, the Torture Memo opined that even if an interrogator violated the anti-torture statute, "the Department of Justice could not enforce [the anti-torture statute] against federal officials acting pursuant to the President's constitutional authority to wage a military campaign."[57] The memo reasoned that inasmuch as the Constitution vests in the President the power to act as "Commander in Chief of the Army and Navy of the United States,"[58] and "[o]ne of the core functions of the Commander in Chief is that of capturing, detaining, and interrogating members of the enemy,"[59] it follows that "Congress can no more interfere with the President's interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield."[60]

The Torture Memo's position that the President is free to ignore the torture statute is striking; after all, the Constitution obligates the President to "take Care that the Laws be faithful-

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detainee was aware and could have disclosed during interrogation. The Torture Memo, however, acknowledges none of the difficulties of determining whether coercive interrogation is necessary to thwart future attacks despite the fact that this problem would have been highly relevant to its consideration of the doctrines of necessity and self-defense.

[56] *See* Bradbury Interrogation Techniques Memo, *supra* note 36, at 155; Levin Torture Memo, *supra* note 16, at 129-30.

[57] Torture Memo, *supra* note 14, at 86.

[58] U.S. CONST. art. II, § 2, cl. 1.

[59] Torture Memo, *supra* note 14, at 89.

[60] *Id.* at 90; *accord* Military Interrogation Memo, *supra* note 9, at 18-19.

ly executed."[61] As the Supreme Court observed in the *Steel Seizure* case, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[62] Thus, as a matter of textual analysis, the claim that the President has the power to make the law governing interrogation is deeply suspect.

To be sure, if a statute unconstitutionally invaded the President's powers as Commander in Chief, it presumably would be unenforceable by virtue of the Constitution's Supremacy Clause,[63] as well as the President's constitutional obligation to "preserve, protect and defend the Constitution of the United States."[64] Still, it is striking that the Torture Memo analyzes the Commander in Chief power in isolation; it gives no consideration to relevant sources of congressional power to regulate the manner in which interrogations are conducted. This is not an obscure point; nearly four decades before the Torture Memo was written, in the *Steel Seizure* case, Justice Jackson famously observed: "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[65] This principle, however, goes unmentioned in the Torture Memo.[66] Congress, in turn, has substantial power over the manner in which the nation is defended; this has been settled since at least *Little v. Barreme*,[67] in which the Court held a naval officer liable for the seizure of a Danish vessel during a period of hostilities between the United States and France even though the officer acted in conformity with a presidential order on the ground that Congress had only authorized the seizure of American vessels sailing to French ports.[68] Notably, *Little*, like the *Steel Seizure* case, makes no appearance in the Torture Memo.

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[61] U.S. CONST. art. II, § 3.

[62] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952). The Court continues to cite this statement with approval. *See* Medellin v. Texas, 552 U.S. 491, 526-27 (2008); INS v. Chadha, 462 U.S. 919, 953 n.16 (1983); Buckley v. Valeo, 424 U.S. 1, 123 (1976) (per curiam).

[63] *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

[64] U.S. CONST. art. II, § 1, cl. 7. For arguments along these lines, see Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 919-24 (1990); and Saikrishna Bangalore Prakash, *The Executive's Duty To Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1628-45 (2008).

[65] *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

[66] Professor Yoo subsequently explained that he understands the holding in *Youngstown*, invalidating President Truman's seizure of steel mills in order to keep them in production during a labor dispute, as resting on the principle that the area of labor relations falls within congressional authority, unlike the interrogation of enemy

At least three provisions of the Constitution appear to grant Congress power to regulate interrogation by the armed forces, although none are considered in the Torture Memo. First, the Constitution empowers Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces."[69] This provision has long been construed to enable Congress to define and punish offences committed by members of the armed forces.[70] Second, the Constitution empowers Congress "[t]o define and punish . . . Offences against the Law of Nations,"[71] and as we have seen, the anti-torture statute was enacted to discharge the obligations of the United States under the Convention Against Torture. In fact, the Convention is only

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combatants. *See* YOO, *supra* note 9, at 183-85. The Court, however, has cited on Justice Jackson's concurrence as reflecting a broader proposition concerning executive authority even in cases involving international relations. *See, e.g.*, Medellin v. Texas, 552 U.S. 491, 524 (2008); Hamdan v. Rumsfeld, 548 U.S. 557, 593 n.23 (2006); Dames & Moore v. Regan, 453 U.S. 654, 668 (1981). For a useful discussion of the ample historical evidence supporting this conception of the limits on presidential authority as applied to the Commander in Chief power, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008).

[67] 6 U.S. (2 Cranch) 170 (1804).

[68] *Id.* at 177-79.

[69] U.S. CONST. art. I, § 8, cl. 14.

[70] *See, e.g.*, Solorio v. United States, 483 U.S. 435, 438-50 (1987); United States v. Stanley, 483 U.S. 669, 679 (1987); Dynes v. Hoover, 61 U.S. (20 How.) 65, 78-79 (1857); United States v. Bevans, 16 U.S. (3 Wheat.) 336, 390 (1818). For a discussion of the framing-era understanding of congressional authority under this Clause, see Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 338-40 (2008).

[71] U.S. CONST. art. I, § 8, cl. 10.

one of many international agreements that outlaw torture.[72] Indeed, the norm against torture is so deeply rooted that it is considered a part of the customary international law that is enforceable among nations even apart from treaty obligations.[73] Thus, a statute forbidding torture under color of law by United States officials when abroad seems to fit comfortably within congressional power to punish violations of international law. Finally, the Constitution authorizes Congress "[t]o . . . make Rules concerning Captures on Land and Water."[74] Although the Supreme Court has never squarely decided whether the Captures Clause is a grant of authority to regulate the conditions and manner of confinement for prisoners or is limited to the subject of captured property, the Court long observed that a congressional enactment during the War of 1812 "concerning alien enemies, which confers on the president very great discretionary powers respecting their persons, affords a strong implication that he did not possess those powers by virtue of the declaration of war."[75] Thus, the Court has strongly implied that Congress has authority to regulate the conditions under which enemy combatants are held and interrogated.[76]

Aside from all this, there is abundant framing-era evidence that the Constitution was understood to authorize Congress to regulate the treatment of prisoners.[77] Similarly, *Little* suggests a framing-era understanding that Congress has broad authority over the manner in which the armed forces operate even during a period of active hostilities. The Torture Memo, however, addressed none of this framing-era evidence, just as it failed to address the constitutional bases of congressional authority to enact the anti-torture statute.[78] Perhaps unsurprisingly, the Bush Administration subsequently repudiated the constitutional analysis in the Torture Memo and expressly ac-

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[72] *See* HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS 224-28 (rev. 2008).

[73] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 Reporters' Note 5 (1987); Rolf Kuhner, *Torture*, *in* IV ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 868, 868, 869 (Rudolph Bernhardt ed., 2000). In the 2004 legal opinion that superseded the Torture Memo, the Bush Administration acknowledged that the prohibition on torture is part of customary international law. *See* Levin Torture Memo, *supra* note 16, at 128 & n.2.

[74] U.S. CONST. art. I, § 8, cl. 11.

[75] Brown v. United States, 12 U.S. (8 Cranch.) 110, 126 (1814).

[76] To these three sources of congressional authority, one might add Congress's authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States." U.S. CONST. art. I, § 8, cl. 18; *see* Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1238-43 (2005).

[77] *See* Prakash, *supra* note 70, at 338-40. For a critical assessment of the use of historical evidence in Professor Yoo's scholarship to support his claim of presidential

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authority to disregard statutes, see Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377, 399-419 (2011).

[78] To be fair, although the Torture Memo did not address congressional authority under the Captures Clause, two other OLC opinions had recently stated that the Captures Clause was applicable only to captured property, although the Bush Administration later repudiated that view as failing to adequately consider relevant framing-era evidence that the Captures Clause was understood to grant Congress power over enemy prisoners as well as their property. *See* Memorandum for the Files, *Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001*, from Stephen G. Bradbury, Principal Deputy Assistant Att'y Gen., Jan. 15, 2009, at 5-6, *available at* www.justice.gov/olc/docs/memostatusolcopinions01152009.pdf [hereinafter Status Memo]. Nevertheless, some charity is probably warranted on this point; there is a serious argument that the Captures Clause is limited to seizures of property. *See* Prakash, *supra* note 70, at 319 & n.82, 338; Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683, 1729-45 (2009). *But see* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 735 n.143 (2008); Aaron D. Simowitz, *The Original Understanding of the Capture Clause*, 59 DEPAUL L. REV. 121, 130-39 (2009). Professor Yoo has defended this view since leaving government. *See* John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1201-02 (2004). The Torture Memo's failure to treat with Armed Forces and Law of Nations Clauses, however, is more difficult to explain. As to the former, although a recent OLC opinion had implied that Congress lacked authority under the Government and Regulation of the Land and Naval Forces Clause to regulate the treatment of prisoners, that memo had ultimately declined to resolve the question, *see* Memorandum for William J. Haynes II, Gen. Counsel, Dep't of Def., *The President's Power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations*, from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, at 5-6 (Mar. 13, 2002), *available at* www.justice.gov/olc/docs/memorandum03132002.pdf. The same can be said of the memo's failure to address the Law of Nations Clause; while a recent OLC opinion had stated that Congress had no power to prevent the President from undertaking the prosecution of enemy combatants before tribunals constituted by the President, that memorandum never made the broader claim that Congress lacks authority to define and punish crimes relating to the treatment of enemy combatants. *See* Memorandum for Daniel J. Bryant, Assistant Att'y Gen., Office of Legislative Affairs, *Swift Justice Authorization Act*, from Patrick Philbin, Deputy Assistant Att'y Gen., at 17-19, *available at* www.justice.gov/olc/docs/memojusticeauthorizationact0482002.pdf.

knowledged the constitutionality of the anti-torture statute.[79] Even before this formal concession, when it litigated the extent of presidential authority to authorize the trial of enemy combatants, the Bush Administration was unwilling to advance an argument that the President had authority under the Commander in Chief Clause to try imprisoned enemy combatants in a manner inconsistent with an applicable statute.[80] Thus, the Torture Memo's view that the President has plenary power over enemy combatants in the custody of the United States power was one that the Bush Administration itself concluded was untenable.

3. The consequences of the Torture Memo

It is striking how many of the positions taken in the Torture Memo were ultimately repudiated by the Bush Administration. On that score, Professor Yoo has claimed that the legal opinions that replaced the Torture Memo changed little of substance.[81] At first blush, there seems to be something to this claim. The 2004 OLC memorandum on the anti-torture statute that replaced the Torture Memo notes: "While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions . . . involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum."[82] Moreover, when the OLC subsequently reassessed the interrogation techniques that the CIA proposed to use on a "high value al Queda detainee in the War on Terror,"[83] it concluded that if waterboarding were confined to no more than forty-second applications, limited to no more than two in any twenty-four-hour period and occurring on no more than five days within a single thirty-day period, it would not result in sufficiently prolonged physical or mental suffering to fall within the scope of the anti-torture statute.[84]

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[79] *See* Status Memo, *supra* note 78, at 3-6.

[80] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 591-93 & n.23 (2006).

[81] *See* YOO, *supra* note 9, at 182-83.

[82] Levin Torture Memo, *supra* note 16, at 130 n.8.

[83] Bradbury Interrogation Techniques Memo, *supra* note 36, at 152.

These conclusions are not unassailable. For example, although the subsequent memoranda rejected the Torture Memo's claim that the statutory phrase "severe physical pain or suffering" was a unitary concept, they also echoed the Torture Memo in opining that "severe suffering" must be prolonged,[85] an implausible reading of the statute given that only the statutory definition of "mental pain or suffering" contains this kind of temporal requirement, as we have seen.[86] If the temporal requirement is rejected as inconsistent with the statutory definition of "severe physical suffering," moreover, then even if waterboarding is not considered painful, it is surely not difficult to conclude that the use of what the OLC itself had acknowledged amounts to "a threat of imminent death,"[87] followed by the sensation of "suffocation and incipient panic," that is, "the fear or panic associated with the feeling of drowning,"[88] amounts to the imposition of severe physical suffering, thereby satisfying the statutory definition of "torture." Consider the kind of evidence that could be adduced in a prosecution under the anti-torture statute based on waterboarding:

> In the press, the process has been called "simulated drowning." But Malcolm Nance, the former master instructor at the Navy SERE school who estimated that he had overseen hundreds of waterboarding sessions, as well as having been waterboarded himself, argued that the media didn't really explain the process accurately to the American public. "It's not simulated anything. It's slow motion suffocation with enough time to contemplate the inevitability of blackout and expiration – usually the person goes into hysterics on the board," he

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[84] *See id.* at 169-71, 191-97. For an analysis of the statute consistent with that taken in these memoranda, see Boehm, *supra* note 23, at 17-32.

[85] *See* Levin Torture Memo, *supra* note 16, at 143; Bradbury Interrogation Techniques Memo, *supra* note 36, at 193-94.

[86] *See supra* text at notes 12-13, 22. For a useful discussion of the flaws in this approach, see Sheldon Gelman, *Lawyers, Interrogations, and the Historic Framework of the Debate about Torture*, 10 CONN. PUB. INT. L.J. 101, 125-27 (2010).

[87] Interrogation Techniques Memo, *supra* note 24, at 123.

[88] *Id.* at 109, 118.

> said. "You can feel every drop. Every drop. You start to panic. And as you panic, you start gasping, and as you gasp, your gag reflex is overridden by water. And then you start to choke, and then you start to drown more. Because the water doesn't stop until the interrogator wants to ask you a question. And then, for that second, the water will continue, and you'll get a second to puke and spit up everything that you have, and then you'll have an opportunity to determine whether you're willing to continue with the process." Nance had no doubt that waterboarding was torture, and wrong for U.S. soldiers to use on captives.[89]

This might sound like "severe physical suffering" to a jury. Indeed, American history is replete with torture prosecutions based on the use of water to create the sensation of drowning.[90] But, even treating the view of the anti-torture statute taken by the Bush Administration's OLC after the departure of Professor Yoo as correct, it seems plain that CIA interrogators undertook measures that were unlawful under that view, although not under the original Torture Memo. The Torture Memo, in other words, was not some sort of "harmless error."

As we have seen, the original Interrogation Techniques Memo authorized the use of waterboarding in a manner consistent with its use in SERE, the Navy's program of survival training. When waterboarding ensued after the issuance of the Interrogation Techniques Memo, however, it did not conform to the SERE protocol. The CIA's Inspector General found:

> [T]he waterboard technique employed at [redacted] was different from the technique as described in the [OLC] opinion and used in SERE training. The difference was in the manner in which the detainee's breathing was obstructed. At the SERE School and in the [OLC] opinion, the subject's airflow is disrupted by the firm application of a damp cloth over the air passages; the interrogator applies a small amount of water to the cloth in a controlled manner. By contrast, the Agency interrogator [redacted] continuously applied large volumes of

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[89] JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 173 (2008).

[90] *See supra* text accompanying note 31.

> water to a cloth that covered the detainee's mouth and nose. One of the psychologists/interrogators acknowledged that the Agency's use of the technique differed from that used in SERE training and explained that the Agency's technique is different because it is . . . more poignant and convincing.[91]

Moreover, in SERE training, "the technique is confined to at most two applications (and usually only one) of no more than 40 seconds each."[92] The Inspector General found that Abu Zubaydah was waterboarded at least 83 times in August 2002.[93] In March 2003, another high-ranking al-Qaeda detainee, Khalid Shaykh Muhammad, was waterboarded 183 times.[94] Waterboarding of this intensity and duration would seemingly satisfy the definition of "severe physical suffering" adopted in the Bush Administration's OLC memoranda that superseded the Torture Memo because of its prolonged nature. And, aside from its illegality, one has to wonder about the efficacy of a technique that must be repeated so frequently.[95]

Although the waterboarding conducted on Abu Zubaydah and Khalid Shaykh Muhammad appears to have constituted unlawful torture under the interpretation of the anti-torture statute that was eventually adopted by the Bush Administration, under the original Torture Memo, this kind of waterboarding seems to have been considered lawful. Although, as we have seen, the original Interrogation Techniques Memo did not authorize waterboarding beyond the techniques used in the SERE program, on July 29, 2003, the CIA obtained an opinion from someone at the Department of Justice that "certain deviations are not significant."[96] In addition, the Attorney General acknowledged to the CIA's Inspector General that "he [wa]s fully aware of the repetitive use of the waterboard and that [the] CIA [wa]s well within the scope of the [OLC] opinion and the authority given to the CIA by that opinion."[97] Since waterboarding of such intensity and protracted character was not envisioned in the original Interrogation Techniques Memo, and cannot be squared with the later OLC opinions, it seems that only the original Torture Memo's view that an interrogation technique must inflict physical pain amounting to organ failure or the like to violate the statute, coupled with the Torture Memo's recognition of various defenses, could have enabled the Department of Justice to deem the CIA's variations from its original waterboarding proposal "immaterial."[98]

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[91] IG REPORT, *supra* note 35, at 37.

[92] Bradbury Interrogation Techniques Memo, *supra* note 36, at 193; *accord* IG REPORT, *supra* note 35, app. F, at 8.

[93] IG REPORT, *supra* note 35, at 90.

[94] *Id.* at 91.

[95] The CIA itself was uncertain whether there was any justification for the repeated waterboarding of Abu Zubaydah. Its Inspector General found that the interrogation team eventually concluded that Zubaydah was compliant and wanted to terminate "enhanced interrogation techniques" but senior officials overruled that judgment and "witnessed the final waterboard session, after which, they reported . . . to Headquarters that the [enhanced interrogation techniques] were no longer needed on Abu Zubaydah." *Id.* at 85.

Thus, it was the Torture Memo and not any other OLC opinion issued then or later that enabled the Department of Justice to turn a blind eye into the massive escalation of waterboarding that followed its issuance. For this reason, the claim that there is no meaningful difference between the original torture memo and its successors is insupportable. Only the Torture Memo offered support for the brutal and prolonged techniques used on Khalid Shaykh Muhammad and Abu Zubaydah. On just that point, it is instructive that when the 2004 memorandum on the anti-torture statute did not reject the conclusions contained in "prior opinions . . . involving the treatment of detainees,"[99] this formulation is an apparent reference to the Interrogation Techniques Memo, not the Torture Memo. Indeed, the author of the 2004 OLC opinion, in subsequent congressional testimony, expressly denied that the 2004 opinion is properly understood to endorse those interrogation techniques that had been considered permissible under the Torture Memo.[100] Thus, the Torture Memo provides the only legal support that the OLC ever offered for what looks like the CIA's slide from interrogation to sadism during the prolonged waterboarding of Khalid Shaykh Muhammad and Abu Zubaydah.

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[96] *Id.* at 5. The identity of the official who provided this opinion is something of a mystery. Assistant Attorney General Bybee had left the Department of Justice in March 2003. OPR REPORT, *supra* note 9, at 110. Professor Yoo had left the Department of Justice on May 30, 2003. *Id.* at 102 n.80. Assistant Attorney General Bybee's successor, Jack Goldsmith, did not begin service until October 6, 2003. *Id.* at 110.

[97] IG REPORT, *supra* note 35, at 45.

[98] Until a meeting on June 20, 2003, the CIA appears to have conducted its interrogation in reliance on a series of "bullet points" that had been prepared in reliance on the legal positions taken in the Torture Memo. *See* OPR REPORT, *supra* note 9, at 100-04. At a meeting on that date, an OLC official explained that the bullet points could not be treated as authoritative. *See id.* at 104. At that time, it appears that a number of high-ranking officials understood that the CIA had exceeded the scope of permissible interrogation techniques under the Interrogation Techniques Memo with respect to Abu Zubaydah and Khalid Shaykh Muhammad yet also believed that there had been no violation of the law. *See id.* at 104-05. In this judgment, it appears that reliance was being placed on the Torture Memo, not the Interrogation Techniques Memo.

B. The Domestic Military Operations Memo

Although it has received far less attention than the Torture Memo, another OLC opinion is equally remarkable. A memorandum addressing the constitutional and statutory constraints on domestic counterterrorist military operations, signed by Deputy Assistant Attorney General Yoo and Special

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[99] Levin Torture Memo, *supra* note 16, at 130 n.8.

[100] In his testimony, the author of the 2004 opinion explained its discussion of the prior OLC opinions concerning the anti-torture statute:

> [W]hat I meant was, if you took the other opinions the office had written analyzing particular techniques, and you took out the statutory analysis there and put in the new statutory analysis, in my view, the people writing those opinions would not have come to a different conclusion. Because, for instance, they never said this pain is really, really extreme, and it is just up to the line of body—organ failure, but it is not quite there.
>
> They never—those opinions never thought they were close to the line. It did not mean, as some have interpreted—and again this is my fault, no doubt, in drafting—that we had concluded that we would have reached the same conclusions as those earlier opinions did. We were, in fact, analyzing that at the time, and we never completed that analysis.

From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules (Part II): Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 110th Cong. 42 (2008) (testimony of Daniel Levin). According to one account, the author of the 2004 opinion crafted the memo in order to avoid endorsing any oral approvals that Professor Yoo or others had given to what he regarded as highly questionable CIA interrogation practices. *See* MAYER, *supra* note 89, at 307.

Counsel Robert J. Delahunty,[101] opines that "the Fourth Amendment does *not* apply to domestic military operations designed to deter and prevent further terrorist attacks."[102] On this view, despite the constitutional prohibition on unreasonable search and seizure, the military can engage in effectively unconstrained arrest, detention, and search of American citizens, their property and effects on American soil if done in the name of counterterrorism. It is not going too far to say that this Domestic Military Operations Memo authorized the establishment of a form of martial law within the United States.

The Fourth Amendment contains an unqualified prohibition on unreasonable search and seizure:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[103]

Nevertheless, the Domestic Military Operations Memo claimed that "the central concerns of the Amendment – and especially the Warrant Clause – are focused on police activity."[104] It added, "however well suited the warrant and probable cause requirements may be as applied to criminal investigations or other law enforcement activities, they are unsuited to the demands of wartime and the military necessity to successfully prosecute a war against an enemy."[105]

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[101] Robert Delahunty currently teaches at the University of St. Thomas School of Law. *See* Faculty bio for Professor Robert Delahunty, http://www.stthomas.edu/law/faculty/bios/delahuntyrobert.htm (last visited Mar. 30, 2011).

[102] Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep't of Def., from John C. Yoo, Deputy Assistant Att'y Gen., and Robert J. Delahunty, Special Counsel, *Authority for Use of Military Force to Combat Terrorist Activities within the United States*, Oct. 23, 2001, at 25 (emphasis in original), *available at* http://www.justice.gov/olc/docs/memomilitary forcecombatus10232001.pdf [hereinafter Domestic Military Operations Memo].

[103] U.S. CONST. amend. IV.

[104] Domestic Military Operations Memo, *supra* note 102, at 23.

[105] *Id.* at 24.

For example, the memo observed, it was settled that the President's constitutional powers included the power to "requisition property immediately needed for the prosecution of the war,"[106] and to "detain individuals whom the Government believes to be dangerous."[107] It followed, according to the memo, that "[o]ur forces must be free to 'seize' enemy personnel or 'search' enemy quarters, papers and messages without having to show 'probable cause' before a neutral magistrate, and even without having to demonstrate that their actions were constitutionally 'reasonable.'"[108] The memo noted that there was no "case from the War of 1812 – the last major conflict fought out on American soil against a foreign enemy – in which plaintiffs brought a successful wrongful death action due to federal military operations within the continental United States,"[109] and no "Civil War examples in which plaintiffs successfully brought wrongful death actions arising from federal military operations."[110] Moreover, as early as 1798, Congress authorized the seizure of armed French vessels, and "it was never suggested that the Fourth Amendment restrained the authority of Congress or of the United States agents to conduct [military] operations such as this."[111]

As precedential support for its conclusion, the memo cited the holding of the United States Supreme Court that the Fourth Amendment does not apply to operations overseas in *United States v. Verdugo-Urquidez*,[112] the Court's observation in *Scheuer v. Rhodes*[113] that in suppressing civil disorder, "since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad";[114] and a line of cases holding that the destruction or confiscation of property as an incident of military operations is not considered a "taking" for which just compensation is required under the Fifth Amendment's prohibition on uncompensated takings of private property for a public purpose.[115]

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[106] *Id.* (quoting Yakus v. United States, 321 U.S. 414, 443 (1944)).

[107] *Id.* (quoting United States v. Salerno, 481 U.S. 739, 748 (1987)).

[108] *Id.* at 26.

[109] *Id.*

[110] *Id.* at 27.

[111] *Id.* at 28 (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990)).

[112] *Id.* at 25.

[113] 416 U.S. 232 (1974).

Finally, the memo acknowledged that although it had opined that "the Fourth Amendment would not apply to military operations the President ordered within the United States to deter and prevent acts of terrorism," "courts could decide otherwise," and therefore it "analyze[d] the standards that would govern if courts were to subject domestic military operations to the Fourth Amendment."[116] After recognizing that the Fourth Amendment required that the use of force must be "reasonable," and admitting that it was "not possible to preview the reasonableness analysis for all possible uses of force within the United States," the memo nevertheless added, "the use of force in the current circumstances would be reasonable, within the terms of the Fourth Amendment. Here, military force would be used against terrorists to prevent them from carrying out further attacks upon American citizens and facilities."[117]

Parts of the Fourth Amendment analysis in the Domestic Military Operations Memo are uncontroversial. It is, for example, well-settled that no warrant is required in the face of exigent circumstances that require prompt action.[118] It was also settled by *Verdugo-Urquidez* that the Fourth Amendment has no application to search and seizure occurring overseas, at least when directed against foreign nationals having "no previous significant voluntary connection with the United States."[119] It is equally settled that the Fourth Amendment does not invariably require probable cause or even an individualized determination of reasonable suspicion when a challenged search or seizure is "designed to serve special needs, beyond the normal need for law enforcement."[120] "For example," the Supreme Court has written, "the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack . . . ."[121] The Domestic Military Operations Memo, however, goes beyond any of this; it opines that the military enjoys a categorical exemption from any form of Fourth Amendment review. No matter how utterly unreasonable or unconstrained, the memo contends that search and seizure by the military in an effort to prevent or deter terrorist attacks is immune from constitutional attack.

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[114] Domestic Military Operations Memo, *supra* note 102, at 29 (quoting *Scheur*, 416 U.S. at 247).

[115] *Id.* at 30-34.

[116] *Id.* at 34.

[117] *Id.* at 35, 36.

[118] *See, e.g.*, Michigan v. Fisher, 130 S. Ct. 546, 548-49 (2009) (per curiam); Brigham City v. Stuart, 547 U.S. 398, 403-04 (2006); Michigan v. Tyler, 436 U.S. 499, 510 (1978); Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 298-99 (1967).

[119] United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990).

It is hard to square the memo's position with the text of the Fourth Amendment. The Amendment's opening clause announces an unqualified "right of the people to be . . . secure against unreasonable search and seizure."[122] The text offers no exception for searches undertaken by the military, even if authorized by the President or motivated by concerns for national security. Indeed, offering the military an exception from the prohibition on unreasonable search and seizure seems squarely inconsistent with the text. If the military could break into anyone's home, search and seize their possessions, or "seize" individuals by taking suspects into custody in the hope of preventing a terrorist attack, no matter how flimsy or unreasonable its suspicions might be, surely "the people" would hardly be "secure . . . against unreasonable search and seizure."[123] The constitutional text, in other words, offers a guarantee against all unreasonable search and seizure, not merely unreasonable search and seizure when undertaken by civilian authorities.

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[120] City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000) (internal quotation marks omitted); *accord* Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 829 (2002); Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995); Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

[121] *Edmond*, 531 U.S. at 44.

[122] U.S. CONST. amend. IV.

[123] For a useful discussion of the manner in which the Fourth Amendment's guarantee of security against unreasonable search and seizure illuminates its meaning and sheds light on the detention of those thought to be unlawful enemy combatants suspected of plotting terrorist attacks, see Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 119-31, 138-51 (2008).

In this respect, the unqualified character of the Fourth Amendment differs from its immediate predecessor, which forbids the quartering of troops in private houses but permits a different rule in time of war although, even then, only if authorized by law rather than presidential fiat.[124] Similarly, the Fifth Amendment requires a grand jury indictment "for a capital, or otherwise infamous crime" but carves out an exception for "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."[125] The textual differences between the Third and Fifth Amendments, on the one hand, and the Fourth Amendment, on the other, are striking. Although the Third and Fifth Amendments offer the government greater power in time of war, there is no similar language in the Fourth Amendment. The structure of the Bill of Rights, in other words, indicates that when the Framers wished to carve out an exception for the military or time of war, they did so expressly.

Other structural features of the Constitution similarly undermine the exception to the Fourth Amendment's coverage endorsed by the Domestic Military Operations Memo. In particular, the Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[126] Habeas corpus, in turn, has been understood since the framing era to grant individuals the ability to obtain judicial review of the lawfulness of their custody.[127] A "seizure" within the meaning of the Fourth Amendment, however, includes taking an individual into custody.[128] If domestic military operations were not subject to the Fourth Amendment, however, there would be little logic to the Suspension Clause; the military would have no need of suspension because it would be free to take individuals into custody without constitutional constraint.[129]

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[124] *See* U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

[125] U.S. CONST. amend. V.

[126] U.S. CONST. art. I, § 9, cl. 2.

[127] *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807). For a more recent account from the Court of the history and meaning of the constitutional privilege of habeas corpus, see Boumediene v. Bush, 553 U.S. 723, 739-46 (2008).

As for the Domestic Military Operations Memo's historical claim that the Fourth Amendment has never been understood to apply to the military, refutation can be found in one of the most important works on constitutional law in the history of the Republic, Joseph Story's *Commentaries on the Constitution.*[130] In the treatise, "[a]ccepted as a classic as soon as it appeared,"[131] Justice Story denounced the warrantless military seizure of American citizens suspected of treason during the Jefferson Administration as a violation of the Fourth Amendment.[132] To be sure, it seems that battlefield operations have rarely generated Fourth Amendment or tort litigation; but given the leeway that the law grants the government under exigent circumstances, it should be unsurprising that battlefield operations are rarely challenged under the Fourth Amendment or the law of torts. The Domestic Military Operations Memo, however, does not confine the exception it grants from Fourth Amendment scrutiny to battlefield operations, or even "an appropriately tailored roadblock set up to thwart an imminent terrorist attack,"[133] but claims that any military operation aimed at preventing or deterring terrorism is exempt from the commands of the Fourth Amendment.

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[128] *See, e.g.*, Hayes v. Florida, 470 U.S. 811, 815-16 (1985); Dunaway v. New York, 442 U.S. 200, 213-16 (1979).

[129] The memo did not claim that the privilege of habeas corpus had been suspended in the wake of the terrorist attacks of September 11. When the issue of executive authority to detain suspected terrorists subsequently reached the Supreme Court, the Bush Administration did not claim that privilege of habeas corpus had been suspended. *See Boumediene*, 553 U.S. at 771; Hamdi v. Rumsfeld, 542 U.S. 507, 525 (2004) (plurality opinion); *id.* at 573 (Scalia, J., dissenting).

[130] The Supreme Court has repeatedly acknowledged the importance of Justice Story's treatise to constitutional history. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 608 (2008); Washington v. Texas, 388 U.S. 14, 19-20 (1967). *See generally* R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 181-95 (1985).

[131] BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 137 (1993).

[132] *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1895, at 749 n.1 (1833).

Then there is a key precedent, *United States v. United States District Court*,[134] which goes unmentioned in the Domestic Military Operations Memo.[135] In what is commonly known as the *Keith* case, the Court considered "the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval."[136] In that case, "the Attorney General approved the wiretaps to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government."[137] The Court rejected the claim that the President could authorize warrantless electronic surveillance without prior judicial approval if motivated by a concern for national security:

> Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and

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[133] City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).

[134] 407 U.S. 297 (1972).

[135] At one point, the memo cites the case, but only in a discussion relating to the Posse Comitatus Act, and only for the proposition that the Foreign Intelligence Surveillance Act "arose out of a background in which the Supreme Court had declined to rule on the President's constitutional authority to order warrantless electronic surveillance of foreign powers and their agents within the United States." Domestic Military Operations Memo, *supra* note 102, at 18-19.

[136] 407 U.S. at 299.

[137] *Id.* at 300 (internal quotation marks omitted).

> overlook potential invasions of privacy and protected speech.[138]

While acknowledging the government's claim that "the requirement of prior judicial review would obstruct the President in the discharge of his constitutional duty to protect domestic security"[139] and that traditional Fourth Amendment standards "were established to govern investigation of criminal activity, not ongoing intelligence gathering,"[140] the Court nevertheless concluded that "the President's domestic security role . . . must be exercised in a manner compatible with the Fourth Amendment."[141]

To be sure, *Keith* leaves important questions open. For example, *Keith* puts aside questions related to the surveillance of "foreign powers or their agents,"[142] a concept that could readily reach foreign terrorist organizations. Indeed, another OLC memorandum issued just a few days before the Domestic Military Operations Memo, and also signed by Deputy Assistant Attorney General Yoo, noted that some lower courts had held even after *Keith* that surveillance of the agents of a foreign power need not be authorized by warrant.[143] None of these cases, however, had held that intercepting the conversations of those thought to be agents of foreign powers or organizations is entirely exempt from Fourth Amendment scrutiny for reasonableness; indeed, each of these cases reviewed the challenged surveillance for reasonableness within the meaning of the Fourth Amendment.[144] As we have seen, however, the Domestic

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[138] *Id.* at 316-17 (citations omitted).

[139] *Id.* at 318.

[140] *Id.* at 319.

[141] *Id.* at 320.

[142] *Id.* at 322.

[143] Memorandum for David S. Kris, Associate Deputy Att'y Gen., from John C. Yoo, Deputy Assistant Att'y Gen., *Constitutionality of Amending the Foreign Intelligence Surveillance Act to Change the "Purpose" Standard for Searches*, Sep. 25, 2001, at 4, *available at* http://www.justice.gov/olc/docs/memoforeignsurveillanceact09252001.pdf.

[144] *See* United States v. Truong Dinh Hung, 629 F.2d 908, 914-17 (4th Cir. 1980); United States v. Buck, 548 F.2d 871, 875-76 (9th Cir. 1977); Zweibon v. Mitchell, 516 F.2d 594, 616-59 (D.C. Cir. 1975) (plurality opinion); *id.* at 699-706 (Wilkey, J., concurring and dissenting); *id.* at 706-07 (MacKinnon, J., concurring in part and dissenting in part); United States v. Butenko, 494 F.2d 593, 602-09 (3d Cir. 1974); United States v.

Military Operations Memo did not purport merely to exempt the military from the warrant requirement; it had opined that the military was exempt from the Fourth Amendment altogether when engaged in counterterrorism. On the memo's view, courts are powerless to curb even the most egregious abuses; the military can establish what amounts to martial law as long as it is in the name of deterring or preventing terrorism.

Nor does the memo make the slightest effort to square its view of unlimited executive prerogative with *Keith*'s discussion of the dangers of unfettered executive discretion. One would expect some effort to grapple with *Keith*'s view that unlimited executive power cannot be reconciled with the Fourth Amendment, but the Domestic Military Operations Memo simply ignores that problem.[145]

Equally problematic is the manner in which the memo deploys what it characterizes as supporting authority. As we have seen, although the memo cites *Verdugo-Urquidez*, the holding in that case exempts only search and seizure occurring outside of the United States from Fourth Amendment scrutiny, and even then only if the target lacks significant contacts with the United States. While dicta in *Scheuer v. Rhodes* recognizes that executive discretion to suppress civil unrest is broad, the Court's holding in that case was that executive officials enjoy no absolute immunity from civil liability for damages in these circumstances.[146] Such a holding hardly supports the view that

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Brown, 484 F.2d 418, 425-27 (5th Cir. 1973). That has also been the practice of courts assessing the constitutionality of electronic surveillance of the agents of foreign powers or foreign terrorist organizations subsequent to the issuance of the Domestic Military Operations Memo. *See, e.g.*, *In re* Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 157, 167-77 (2d Cir. 2008) (search and seizure overseas directed at U.S. citizens for purposes of counterterrorism need not be authorized by warrant but must be constitutionally reasonable); *In re* Sealed Case, 310 F.3d 717, 736-46 (FISA Ct. Rev. 2002) (requiring constitutional reasonableness for domestic electronic surveillance directed at foreign terrorists).

[145] Although Professor Yoo has not offered a defense of the Domestic Military Operations Memo since leaving government service, its co-author has; yet, even that effort makes no attempt to accommodate the breadth of the memo's conclusion with *Keith*. *See* Robert J. Delahunty, *The Fourth Amendment Goes to War*, ENGAGE, Oct. 2009, at 107.

[146] *See* 416 U.S. 232, 247-49 (1974).

the Fourth Amendment has no application to domestic military operations involving counterterrorism.

As for the Takings cases, at most they suggest that the destruction of property as an incident of military operations may not be a "seizure," but they do not support a categorical exception for all military activities from the Fourth Amendment. Even worse, in its discussion of cases holding that the military has the power to requisition property for military purposes, the Domestic Military Operations Memo does not claim any precedent for concluding that such requisitions are exempt from the Fifth Amendment's compensation requirement, much less the Fourth Amendment's prohibition on unreasonable search and seizure.

Perhaps the cases involving the seizure of the property of hostile governments or the citizens or the detention of persons during hostilities are closer to being on point, but none of these cases hold that the military has unreviewable power to detain anyone it wishes during periods of active hostilities, at least absent a suspension of the privilege of habeas corpus. For example, the memo noted:

> [I]n *Moyer v. Peabody*, the Court rejected a due process claim by an individual jailed for two and a half months without probable cause by the State Governor in time of insurrection. As Justice Holmes wrote, "[w]hen it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment."[147]

Even putting aside the fact that *Moyer* was a due process case that did not consider the Fourth Amendment,[148] although *Moyer* counsels deference to the executive's judgment, it stops well short of announcing a categorical exemption of executive detention from constitutional scrutiny:

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[147] Domestic Military Operations Memo, *supra* note 102, at 24 (citations omitted) (quoting Moyer v. Peabody, 212 U.S. 78, 85 (1909)).

[148] The Fourth Amendment was not held to be applicable to the States until *Wolf v. Colorado*, 338 U.S. 25, 33 (1949).

> [I]t may be that a case could be imagined in which the length of the imprisonment would raise a different question. But there is nothing in the duration of the plaintiff's detention or in the allegations of the complaint that would warrant submitting the judgment of the governor to revision by a jury.[149]

If anything, precedent suggests that the military's authority to engage in search and seizure is subject to constitutional constraint; in the wake of the Civil War, the Supreme Court held that the Constitution does not tolerate subjecting civilians to martial law in areas where the civilian courts are open and operating.[150] The Court continues to cite this holding as good law with respect to the use of martial law against noncombatants thought to pose a danger to national security.[151]

Thus, there is no support for the view that the military enjoys a general exemption from the individual rights recognized in the Constitution when it acts to protect national security. There is no more support for a view of the Fourth Amendment that effectively endorses unconstrained search and seizure in the name of fighting terrorism. And again, unsurprisingly, in a subsequent memorandum, the Bush Administration's OLC rejected the categorical exemption from Fourth Amendment scrutiny contained in the Domestic Military Operations Memo: "The Fourth Amendment is fully applicable to domestic military operations, though the application of the Fourth Amendment's essential 'reasonableness' requirement to particular circumstances will be sensitive to the exigencies of military actions."[152]

Perhaps the authors of the Domestic Military Operations Memo did not intend to grant the military carte blanche; perhaps they intended only to suggest that the Fourth Amendment's reasonableness requirement must be applied in light of felt military exigencies, as indicated in the OLC opinion that replaced the original opinion. Indeed, at points, the Domestic Military Operations Memo seems to acknowledge that applicable precedents offer support for that proposition, rather than a categorical exemption from constitutional constraint for domestic military operations.[153] If so, the memo is extraordinarily poorly executed. Rather than stressing the need to defer to the military's assessment of security exigencies, the memo announces a categorical rule that "the Fourth Amendment would not apply to military operations the President ordered within the United States to deter and prevent acts of terrorism."[154] In this respect, the memo is so poorly drafted that it runs into the holding of *Keith*; it does not bother to observe that the Supreme Court had already rejected a claim of absolute executive power when it comes to those suspected of belonging to domestic terrorist organizations.[155] As we have seen, *Keith* reserved decision only on the scope of executive power with respect to foreign powers and, by implication, foreign terrorist organizations and their agents as well but unambiguously rejected the claim that the Fourth Amendment is inapplicable to search and seizure directed at domestic terrorists, even if justified in terms of national security. The Domestic Military Operations Memo, however, does not bother to limit the scope of the exemption from Fourth Amendment constraint that it recognized to military operations directed at members of foreign terrorist organizations; the memo seemingly permits unconstrained search and seizure even when targeted at those suspected of belonging to wholly domestic terrorist organizations as it unqualifiedly concludes that "the Fourth Amendment does *not* apply to domestic military operations designed to deter and prevent further terrorist attacks."[156]

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[149] 212 U.S. at 85.

[150] *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 118-30 (1866).

[151] *See* Boumediene v. Bush, 553 U.S. 723, 793-94 (2008); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 14, 22 n.20 (1955); Duncan v. Kahanamoku, 327 U.S. 304, 314 n.10 (1946).

[152] *Memorandum for the Files*, from Stephen G. Bradbury, Principal Deputy Assistant Att'y Gen., Oct. 6, 2008, *available at* http://www.justice.gov/olc/docs/memoolcopiniondomesticusemilitaryforce10062008.pdf [hereinafter Memorandum for the Files].

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[153] *See, e.g.*, Domestic Military Operations Memo, *supra* note 102, at 33 ("These cases show the Court's consistent recognition that the protections of the Bill of Rights are tempered by the circumstances of war.").

[154] *Id.* at 34.

[155] To be sure, *Keith* deals with a delegation of presidential authority to the Attorney General rather than the military, and it does not refer to the subversive organizations that were targeted for investigation as "terrorists"; but these points do not offer any meaningful basis on which to distinguish the holding in that case. As we have seen, *Keith* plainly rejected any claim of unlimited executive authority to engage in unconstrained search and seizure even when national security rather than ordinary law enforcement interests are at stake.

The memo's fallback discussion of the standard of constitutional reasonableness that would be applied to domestic military operations if the courts were to reject the claim of unlimited executive power is also problematic. Whatever the merits of alternate holdings in appellate opinions, alternate conclusions in opinion memos written to provide a client with guidance are of dubious efficacy. When given a broad opinion and a fallback, the client is effectively told that it is free to take the broader opinion without need of further legal advice. When a legal opinion fails to disclose the magnitude of legal risk in taking the broader view, moreover, it is difficult for the client to make an informed choice between the two courses of action that the legal opinion has blessed. Perhaps the presence of a fallback position in a legal memorandum is an implicit signal that the primary position carries significant risk, but surely it is preferable to state this directly rather than to leave the matter to the reader's inference. And, given that the Domestic Military Operations Memo fails to warn the client of the enormous tension between its claim of categorical exemption from Fourth Amendment scrutiny and *Keith*, it is evident that the client was not given sufficient legal advice to evaluate the relative risks of the two contrasting views expressed in the memo. Equally problematic, the discussion of the Fourth Amendment's standard of reasonableness in the fallback discussion is so abstract that it is difficult to see how a client could find in it useful advice to address any concrete scenario.[157]

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[156] Domestic Military Operations Memo, *supra* note 102, at 25 (emphasis in original). Indeed, the memo contains language that seems to contemplate application of this conclusion to those thought to be engaged in domestic terrorism:

> Nor is it necessary that the military forces on our soil be *foreign*. Suppose that an armed and violent group of United States citizens seized control of a part of the country or of one of the territories, and declared itself independent, as occurred during the Civil War. Federal Armed Forces must be free to use force to put down this insurrection without being constrained by the Fourth Amendment, even though force would be intentionally directed against persons known to be citizens.

Id. at 27 (emphasis in original).

C. Assessing John Yoo's Lawyering

Putting aside what are likely highly contested questions of prudence and morality and focusing solely on the quality of the legal analysis, there is much that is distressing in the legal work found in the Torture and Domestic Military Operations Memos. The Torture Memo not only adopts a wholly inapposite definition of "severe physical pain" but also indefensibly conflates the disjunctive "pain or suffering" into a unitary concept—a move that had dramatic implications for the use of waterboarding. The Domestic Military Operations Memo created a gaping hole in the fabric of the Fourth Amendment inconsistent with its text, and without any effort to accommodate the leading precedent. These are only two examples of deeply problematic legal work performed by Professor Yoo at the OLC; there are plenty of others—also subsequently repudiated by the Bush Administration itself.[158]

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[157] A similar problem is presented by another extraordinary observation seemingly made in passing in the Domestic Military Operations Memo: "First Amendment speech and press rights may also be subordinated to the overriding need to wage war successfully." Domestic Military Operations Memo, *supra* note 102, at 24. It is impossible to know what a client should be expected to make of this kind of stray observation. Perhaps a client should be expected not to act on the basis of this type of stray comment, but a client determined to make the most of the leeway offered by this type of seemingly unqualified comment might undertake virtually any type of censorial measure. Perhaps it is unrealistic for a client to rely on such a throwaway observation, but if so, it is unclear what it is doing in a memorandum that purports to give advice to a client. Equally troubling, this discussion fails to disclose that the Supreme Court has rejected a claim of unfettered executive discretion to subordinate speech and press rights to claimed wartime exigencies. *See* N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (per curiam). The Bush Administration's OLC subsequently withdrew this portion of the Domestic Military Operations Memo as containing comments that are "unnecessary to the opinion, are overbroad and general, and are not sufficiently grounded in the particular circumstances of a concrete scenario, and therefore cannot be viewed as authoritative." Memorandum for the Files, *supra* note 152, at 2.

[158] Another good example is provided by a January 9, 2002, OLC memo signed by Yoo and Delahunty opining that the President may unilaterally suspend a treaty even in the face of inconsistent treaty terms or implementing legislation, a position that seems indefensible even from the standpoint of the scholarship sympathetic to claims of broad executive power, given that it is quite clear that treaties bind the President no

It is far from clear that the work in these memoranda satisfies the standard of competence imposed on attorneys.[159]

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less than any other part of the government. *See* Ramsey, *supra* note 76, at 1225-37. This position was subsequently repudiated by the Bush Administration. *See* Status Memo, *supra* note 78, at 8-9. For the Bush Administration OLC's accounting of Professor Yoo's legal work that it later disavowed, see *id.* at 2-11; and Memorandum for the Files, *supra* note 152, at 1-2. In addition, high-ranking officials in the Department of Justice subsequently repudiated Professor Yoo's analysis of the President's authority to undertake electronic surveillance in the absence of congressional authorization. *See* INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM 10-13, 19-29 (July 10, 2009), *available at* http://www.fas.org/irp/eprint/psp.pdf.

[159] *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2010) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). For an argument that the Torture Memo does not satisfy even the minimum standard of competence, see LUBAN, *supra* note 18, at 197-98. At the conclusion of an internal investigation of the memos related to the interrogation of suspected terrorists, Associate Deputy Attorney General David Margolis concluded that the minimum standard of competence was satisfied because

> [a]lthough Yoo and Bybee's errors were more than minor, I do not believe that they evidence serious deficiencies that could have prejudiced the client. This conclusion is largely supported by the reality that the memos were written for a limited audience and were but part of the dialogue with the CIA. The most significant errors, which occurred in the unclassified [Torture Memo], were not likely to cause prejudice because the classified [Interrogation Techniques Memo] issued contemporaneously and approved specified techniques against a specific individual and advised that the advice would not necessarily apply if the facts changed.

Margolis MoD, *supra* note 17, at 65. It is doubtful that this is an appropriate approach to assessing an attorney's duty of competence. At the outset, the requirement of prejudice to the client in order to find a breach of the duty to provide competent representation is highly questionable. It has no support in the text of the applicable rule, and there seems little reason to immunize an attorney for giving a client incompetent advice merely because the client is wise enough to reject it. Beyond that, even if it were appropriate to import a prejudice requirement into the duty of competence, Margolis appears not to have considered the effect that the Torture Memo may have had in the interrogations of Abu Zubaydah and Khalid Shaykh Muhammad. As we have seen, it appears that only the Torture Memo could have been thought to authorize the escalation in waterboarding beyond the proposal considered in the Interrogation Techniques Memo. It is unclear whether this issue was explored in the Office of Professional Responsibility's investigation since the relevant portion of its report is heavily redacted. *See* OPR REPORT, *supra* note 9, at 83-89. The report does make clear, however, that a number of high-ranking officials believed by the summer of 2003 that the CIA had exceeded the scope of permissible interrogation techniques under the Interrogation Techniques Memo with respect to Abu Zubaydah and Khalid Shaykh Muhammad, yet still believed that there had been no violation of the law. *See id.* at 104-05. This sug-

Aside from that problem, a lawyer is bound to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[160] The failure of the memoranda to disclose the serious legal risks associated with the positions that they take may well be inconsistent with this ethical obligation.[161]

Still, the question whether the memos should expose their authors to professional discipline is not clear. Perhaps the memos' repeated use of fallback arguments, such as the Torture Memo's exploration of various defenses to charges of torture and the Domestic Military Operations Memo's exploration of the concept of Fourth Amendment reasonableness, is at least an implicit acknowledgement that the broader positions taken in these memos were, at best, of uncertain legal merit. Perhaps additional warnings regarding legal risk were given, though not reduced to writing, although it is notable that neither Professor Yoo nor his supervisor at the time claimed to have done so.[162] Moreover, OLC opinions are considered binding on all officials in the executive branch unless overruled by the President or the Attorney General.[163] The efficacy of implied warnings about legal risk that can be teased out of the structure of a written opinion or oral warnings not reflected in the controlling OLC opinion is therefore open to serious question.

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gests that by the summer of 2003, senior administration officials were relying on the Torture Memo and not the Interrogation Techniques Memo as their defense for waterboarding of the frequency and intensity that had been employed on Abu Zubaydah and Khalid Shaykh Muhammad. Margolis's failure to treat with this evidence is puzzling.

[160] MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2010).

[161] For an argument along these lines, see Johnsen, *supra* note 11, at 1576-86.

[162] *See* Response to the U.S. Department of Justice Office of Professional Responsibility Final Report Dated July 29, 2009, Submitted on Behalf of Professor John C. Yoo 19-37, Oct. 9, 2009, *available at* http://judiciary.house.gov/hearings/pdf/YooResponse090729.pdf; Classified Response to the U.S. Department of Justice Office of Professional Responsibility Classified Report Dated July 29, 2009, Submitted on Behalf of Judge Jay S. Bybee, Oct. 9, 2009, *available at* http://judiciary.house.gov/hearings/pdf/BybeeResponse090729.pdf.

[163] *See, e.g.*, Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1455-56, 1464-65 (2010); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1305 (2000).

Nevertheless, precisely because those with ultimate authority to make legal policy for the Executive Branch are the President and the Attorney General, it appears that the ethical obligations of OLC attorneys run to those officials.[164] That view has important implications for an assessment of the extent to which OLC attorneys discharged their ethical obligations when producing the Torture and Domestic Military Operations Memos.

First, it may be that responsibility for the approach taken in the memoranda is attributable to the clients and not the lawyers. A lawyer is under an obligation to "abide by a client's decisions concerning the objectives of representation."[165] Perhaps the President and the Attorney General, or the CIA, wished to receive the most aggressive possible view of executive authority with respect to interrogation and search-and-seizure authority rather than a more carefully qualified legal opinion for political or policy reasons. Beyond that, because an OLC opinion might have provided a defense to those who undertook interrogations in reliance on the opinion,[166] the President, the Attorney General, or the CIA might not have been seeking a qualified or equivocal opinion, or an assessment of relevant legal risks, but instead the most aggressive position possible in order to minimize the legal risks faced by those who would have to undertake potentially unlawful interrogations.[167] Still, this is not quite a defense for the memos; even when the client wishes to push the boundaries of the law, a lawyer is under a duty to "exercise independent professional judgment and render candid advice,"[168] and OLC attorneys are not exempted from any of the ethical obligations of lawyers.[169] What is more, although the internal Department of Justice Investigation into the memos relating to the interrogation of suspected terrorists produced evidence that the CIA had expressed its desire to obtain maximum legal protection for its personnel, it produced no evidence that the President, the Attorney General, or the CIA had insisted on an OLC opinion that conferred such immunity.[170] Indeed, "Yoo himself denied that there was any pressure from the White House or the CIA for a particular result."[171]

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[164] *See* MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2010) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."). The Attorney General is authorized to provide legal advice to the President and the heads of executive departments. *See* 28 U.S.C. §§ 510-12 (2006). The Attorney General has delegated this responsibility to the OLC. *See* 28 C.F.R. § 0.25(a) (2010).

[165] MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2010). In addition, "[a] subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." *Id.* R. 5.2(b). This qualification seems to have no application to Professor Yoo, who did not claim that his superiors ordered him to reach any result. To the contrary, Associate Deputy Attorney General David Margolis ultimately concluded that former Assistant Attorney General Bybee did not breach his duty of competence in part because he relied on the advice he received from Professor Yoo in deciding to sign the Torture Memo. *See* Margolis MoD, *supra* note 17, at 64-65.

[166] *See* Note, *The Immunity-Conferring Power of the Office of Legal Counsel*, 121 HARV. L. REV. 2086, 2091-108 (2008).

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[167] On this view, attorneys in the OLC owe their clients the same obligation that lawyers owe to private clients to take the most aggressive view possible consistent with the obligations of competence and to refrain from knowingly advising a client to violate the law that advances the client's interest. For an argument that the ethical obligations of lawyers in the OLC are no different than lawyers with private clients, see Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 447-52 (1993). For a different view focusing on the particular obligations of the President and those who counsel the President with respect to the rule of law, see Johnsen, *supra* note 11, at 1586-601; and Jessalyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terror*, 77 U. COLO. L. REV. 1, 33-39 (2006).

[168] MODEL RULES OF PROF'L CONDUCT R. 2.1 (2010). Moreover, "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." *Id.* In addition, "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ." *Id.* R. 1.2(d). Granting the authors of the Torture Memo the benefit of the doubt, they may have sincerely believed that the interrogation techniques approved in the wake of the Torture Memo were not unlawful. That was the view taken by Associate Deputy Attorney General Margolis. *See* Margolis MoD, *supra* note 17, at 65-67. If so, the remaining question is whether such a belief suggests a lack of professional competence.

[169] *See* 28 U.S.C. § 530B (2006).

[170] *See* Margolis MoD, *supra* note 17, at 51-53; OPR REPORT, *supra* note 9, at 37-40, 46-62.

[171] Margolis MoD, *supra* note 17, at 47. Similarly, one might wonder whether the clients subjected the OLC attorneys to time pressures that compromised the quality of their work, although there is no indication that any of the OLC attorneys ever made such a claim. It is in any event unclear that this factor is entitled too much weight in this context, however, since the attorneys involved denied that they lacked sufficient time, and the Military Interrogation Memo repeated the analysis in the Torture Memo although it was issued some six months later. *See id.* at 16-17.

Second, given the identity of the clients, it may be unrealistic to conclude that the OLC lawyers breached an obligation to provide candid advice and adequate warnings about the risks associated with the legal positions taken in the pertinent memos. Even assuming that the OLC lawyers never offered the clients adequate warnings about the legal risks associated with the positions taken in the Torture and Domestic Military Operations Memos, the President, the Attorney General, and the CIA (which was charged with acting on the advice contained in the Torture Memo) have their own lawyers that were presumably able to evaluate the risks associated with the positions taken in memos. Thus, it may be unfair, at least from the standpoint of professional discipline, to treat OLC lawyers in the same fashion as lawyers who provide an otherwise unrepresented client with legal advice.[172]

Accordingly, it may be unwarranted to conclude that the executive branch lacked fair notice of the potential flaws and aggressive character of the Torture and Domestic Military Operations Memos—it may be that the OLC's client had made a quite considered decision to seek an opinion seeking a particularly aggressive view of the law.[173] On that view, unless the memos are thought to fall below the minimum level of competence required of all lawyers, it may be that whatever the defects in the memos, in reality the clients had all the information necessary in order to make informed assessments of the legal advice in these memos.

Even if the memos should not subject their authors to professional discipline, however, they raise serious questions about the legal judgment and abilities of the authors. As we have seen, the Torture and Domestic Military Operations Memos contain serious errors. On that score, blaming the clients is an unsatisfying explanation for the failures of legal analysis in these memoranda. Whatever the clients' views, they did not prevent Assistant Attorney General Bybee's successor, Jack Goldsmith, from withdrawing the Torture Memo after obtaining the assent of the Attorney General,[174] even though he knew that some officials within the Administration were displeased with the OLC's unexpected change in position.[175] Similarly, as we have seen, whatever the clients' views, they did not prevent the OLC, after Professor Yoo's departure, from issuing additional opinions that repudiated the positions in the Torture and Domestic Military Operations Memos discussed above. It seems that the responsibility for the failures of legal analysis found in these memoranda lies not with the clients, but with the lawyers responsible for producing these memos.

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[172] In rejecting the Office of Professional Responsibility's finding that Professor Yoo had engaged in professional misconduct, Associate Deputy Attorney General Margolis stressed that the Torture Memo was intended for use by sophisticated clients holding high-ranking positions within the executive branch. *See id.* at 45, 65.

[173] For consideration of the issues raised by a client seeking one-eyed legal advice of this character, see William H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, 60 STAN. L. REV. 1555 (2008).

II. THE ROLE OF PROFESSIONAL ABILITY IN THE TEACHING OF LAW

There is a surprising dearth of scholarly literature addressing the question of who is qualified to teach law. As a descriptive matter, however, it seems plain that experience in the practice of law has increasingly little importance in the selection of those who will train the next generation of lawyers. The rise of the theoretician, in turn, may well explain not only some of the problems in legal education today, but also illustrate the responsibility that the legal academy bears for producing the kind of legal work that is reflected in Professor Yoo's unhappy career at the OLC.

A. The Rise of the Theoretician and Its Implications for Preprofessional Education

A study of the career path of law professors, examining those listed as holding tenured or tenure-track appointments in the *American Association of Law Schools* directory for the 1975-76 academic year, found that 67.2% had practiced law prior to teaching and the median length of time spent in practice was five years.[176] Since then, despite the growth of clinical legal education, there has been something of a trend toward even less practice experience among those hired to teach law, especially among law schools ranked at the top of the academic heap. A survey of those teaching law in the 1988-89 academic year, for example, found that only 25% of law professors had more than five years experience in the practice of law, with a mean of 4.3 years practice experience, and among the schools ranked in the top seven by *U.S. News and World Report*, the mean was only 2.7 years practice experience.[177] Considering that these figures include clinicians, it seems plain that experience in practice is given little weight in hiring. A study of those hired by accredited law schools to teach from 1996-2000, in turn, found an average of 3.7 years experience in the practice of law, with an average of only 1.4 years among those hired at schools ranked in the top twenty-five.[178] To similar effect, a survey based on a sample of tenure-track law professors hired between 2000 and 2009 found that those hired typically "had only 3 years of practical legal experience," with those hired by schools ranked in the top tier by *U.S. News and World Report* having a median of one year experience and a mean of 1.79 years, with 45.6% of the entry-level tenure-track professors hired by these schools having no prior practical experience.[179]

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[174] *See* OPR REPORT, *supra* note 9, at 112-13.

[175] *See* GOLDSMITH, *supra* note 9, at 142-62.

Some believe that the explanation for this trend is the competitive pressure exerted by the *U.S. News and World Report* rankings, which put a premium on peer reputation and accordingly incentivize schools to hire based on the scholarly potential or reputation of applicants rather than their familiarity with and ability to impart professional skills.[180] Yet, the pressure to hire theorists in order to enhance the scholarly profile of law schools is not new. Nearly eighty years ago, an editorial in the *Marquette Law Review* complained:

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[176] *See* Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 AM. B. FOUND. RES. J. 501, 503, 510-11.

[177] *See* Robert J. Borthwick & Jordan R. Schau, Note, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REFORM 191, 194, 219 & tbl.20 (1991).

[178] *See* Richard E. Redding, *"Where Did You Go to Law School?" Gatekeeping for the Professoriate and its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 599, 601 tbl.3 (2003).

[179] *See* Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 129-30 (2010).

> [D]uring the past twenty years a powerful group of theorists on the faculties of some of the oldest law schools have developed a policy of banishing from the faculties of these schools men actively engaged in the practice of law and substituting in their places those who are trained in legal theory only . . . .[181]

Whatever the cause, in the legal professoriate we have seen "[t]he rise of theory and the corresponding decline of doctrine."[182]

The emergence of the theoretician as the dominant force in the legal academy has coincided with increased concern about whether law schools are preparing students for the rigors of legal practice. In recent decades, surveys of both students and recent graduates have produced a consistent pattern of complaints about the failure of law school to prepare them for practice.[183] Indeed, one study found that even as they go through law school, students develop a preference for teaching that focuses on practice-oriented skills and that this preference persists after graduation.[184]

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[180] *See, e.g.*, Melissa J. Marlow, *It Takes a Village to Solve the Problems in Legal Education: Every Faculty Member's Role in Academic Support*, 30 U. ARK. LITTLE ROCK L. REV. 489, 492-93 (2008); Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 360 (2001). There is, however, some reason to believe that the *U.S. News* rankings should not be taxed with law schools' focus on the scholarly potential or reputation of those they hire. The most thorough study of the issue to date found that peer assessment scores are driven by prior *U.S. News* rank and not any independent measure of scholarly merit. *See* Jeffrey Evan Stake, *The Interplay between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L.J. 229, 250-52 (2006). There is accordingly surprisingly little empirical evidence that a strategy of hiring theoreticians that produce the type of scholarship thought to be in vogue has an independent effect of a law school's ranking. Conversely, if, as I speculate below, the changing economics of legal practice puts greater market pressure on law schools to produce students with professional skills, then the rankings may actually motivate pedagogical reform as law schools focus on their desirability to applicants and prospective employers, which relate directly to the quality of their student bodies and placement rates, which are themselves important factors in the rankings. *See* Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 S.M.U. L. REV. 493, 497-500, 520-29 (2007).

[181] Editorial Comment, *Practicing Lawyers as Teachers*, 15 MARQ. L. REV. 167, 167 (1931).

[182] Graham C. Lilly, *Law Schools Without Lawyers? Winds of Change in Legal Education*, 81 VA. L. REV. 1421, 1433 (1995).

It is unremarkable that law school graduates focus on their readiness for practice; one 2002 study of those who passed the bar in 2000 found that while 2% were in "nonprofit or education or other" and 9% were in "business," the remaining 89% were practicing law.[185] A survey of the same group in 2007-08 found that 83.5% of respondents were still practicing law.[186] Criticism of law school as providing inadequate preparation for practice, however, is hardly confined to the consumers of legal education. For decades, leading figures in the bench, bar, and the academy have complained that legal education fails to develop the skills necessary for success in the legal profession.[187] There has also been a consistent stream of recommendations from those who have studied legal education that the curriculum of law schools should make greater efforts to integrate the skills necessary for successful representation of clients.[188]

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[183] *See, e.g.*, RONIT DINOVITZER ET AL., THE NALP FOUND. FOR LAW CAREER RESEARCH & EDUC. & AM. BAR FOUND., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 79 (2004); FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION 134-44 (1981); Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 478-81 (1993); E. Gordon Gee & Donald W. Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 BYU L. REV. 695, 936-44.

[184] *See* Douglas D. McFarland, *Students and Practicing Lawyers Identify the Ideal Law Professor*, 36 J. LEGAL EDUC. 93 (1986).

[185] *See* DINOVITZER ET AL., *supra* note 183, at 26-27 & tbl.3.1, 89-90.

[186] *See* RONIT DINOVITZER ET AL., THE NALP FOUND. FOR LAW CAREER RESEARCH & EDUC. & AM. BAR FOUND., AFTER THE JD II: SECOND RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 24 (2009).

[187] *See, e.g.*, Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to our System of Justice?*, 42 FORDHAM L. REV. 227, 232-33 (1973); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992); Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 910-13 (1933); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1252-60 (1991); K.N. Llewellyn, *On What is Wrong With So-Called Legal Education*, 35 COLUM. L. REV. 651, 654-59, 674-76 (1935).

It is not difficult to relate the emergence of the theoretician among the professoriate with the emergence of increasing concern about the ability of law schools to prepare their students for practice. If the primary function of legal education is to inculcate the skills necessary for success in practice, perhaps those who teach law should have reasonable proficiency in those skills. Those who lack familiarity with the foundational skills for success in legal practice, one might theorize, are hardly in a position to teach those skills, and as a consequence, the quality of legal education suffers.[189]

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[188] *See, e.g.*, ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 16-24 (2007); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 56-86 (2007); A.B.A., *Lawyer Competency: The Role of the Law Schools*, 1979 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR 14-16; A.B.A., *Final Report and Recommendations*, 1983 TASK FORCE ON PROF'L COMPETENCE 11-13; A.B.A., *Legal Education and Professional Development—An Educational Continuum*, 1992 TASK FORCE ON LAW SCHS. & THE PROF. 131-41.

[189] In this connection, consider one recent account of the disjunction between the skills required to teach law and to produce what is currently regarded as high-quality legal scholarship:

> Beginning with the rise of the law-and-economics and law-and-society movements in the 1950s and 1960s, interdisciplinarity has become increasingly important in legal scholarship. For decades now, the best legal scholarship has answered the question, "What should the law be?" Lawyers are trained to answer the question, "What is the law?" The tools suited to that task (case crunching, code crunching, and clause crunching) are the central focus of the core curriculum of American law schools. The normative turn in legal scholarship has required legal academics to acquire new tools—from economics, philosophy, sociology, political science, history, and elsewhere. But these new tools, the bread and butter of the legal academic, are not the explicit focus of the standard law-school course—which focuses almost exclusively on primary legal materials (cases, statutes, regulations, rules, and constitutions) and rarely (indeed, almost never) includes a systematic introduction to the canon of legal scholarship.

Lawrence B. Solum, *The New Realities of the Legal Academy*, *in* BECOMING A LAW PROFESSOR: A CANDIDATE'S GUIDE ix, xi (Brannon P. Denning, Marcia L. McCormick & Jeffrey M. Lipshaw eds., 2010). Or, as another legal scholar put it, more succinctly, "Professors are rewarded for thinking with imagination more than with practicality." THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER 177-78 (2010).

There are a number of ways to attack such a theory. At the outset, one could argue that the appropriate place to teach the foundational skills for practice is in the years after graduation, as recent graduates go through a process of apprenticeship not unlike recent medical school graduates. Externalizing training costs onto law firms, however, has its own set of problems. For government and public interest practices with minimal training resources, such an approach can be disastrous. Even in the most profitable portions of the private sector—those with the greatest ability to absorb training costs—the market is increasingly likely to frown on this approach. In what looks to be a remarkably prescient study of large law firms undertaken prior to the recession that began in 2008, William Henderson and Leonard Bierman concluded that as major law firms have increased in size and geographic scope, the increased costs associated with such an approach produced a relatively uniform business model in which major firms sought premium, relatively price-insensitive work that reduced the efficiency of legal service and eroded the satisfaction of clients and lawyers alike.[190] It does not take a degree in economics to know that a business model based on maintaining demand for inefficient, costly, and price-insensitive work is not sustainable. As the economist Herbert Stein memorably observed, "if something cannot go on forever it will stop."[191] So it has proven to be with the practice of law. The recession that followed the period studied by Professors Henderson and Bierman has put enormous cost pressures on even the most successful law firms, leading to layoffs, reduced salaries, and reduced hiring,[192] although it seems clear that these cost pressures have been building for some time.[193] Pressure on legal billing practices in a newly competitive environment that places a premium on efficiency has been particularly intense.[194] In an increasingly competitive environment, law firms will be increasingly less willing to absorb training costs; there is indeed evidence that this trend is gathering steam.[195] Externalizing training costs may therefore no longer be a tenable strategy for law schools.[196] Indeed, it is becoming increasingly apparent, as one scholar recently wrote, that the legal market is coming to view "the major flaw of legal education as the failure to produce more market-ready lawyers with skills and knowledge to add value more quickly in a complex and challenging practice environment."[197] To make matters more concrete, consider the remarks of the associate general counsel of one major consumer of legal services, United Technologies, who recently stated that his firm "does not 'allow first or second year associates to work on any of our matters without special permission, because they're worthless.'"[198]

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[190] *See* William D. Henderson & Leonard Bierman, *An Empirical Analysis of Lateral Lawyer Trends from 2000 to 2007: The Emerging Equilibrium for Corporate Law Firms*, 22 GEO. J. LEGAL ETHICS 1395, 1420-28 (2009). For a similar account of the forces undermining the efficiency and competitive position of major law firms, see Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 760-71.

[191] Herbert Stein, *Leave the Trade Deficit Alone*, WALL ST. J., Mar. 11, 1987, § 1, at 36.

[192] *See, e.g.*, Neil J. Dilloff, *The Changing Cultures and Economics of Large Law Firm Practice and their Impact on Legal Education*, 70 MD. L. REV. 341, 342-46 (2011); Robert J. Rhee, *On Legal Education and Reform: One View Formed from Diverse Perspectives*, 70 MD. L. REV. 310, 318-19 (2011); Eli Wald, *Foreword: The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051, 2051-52 (2010); Erin J. Cox,

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Comment, *An Economic Crisis Is a Terrible Thing to Waste: Reforming the Business of Law for a Sustainable and Competitive Future*, 57 UCLA L. REV. 511, 512-22 (2009).

[193] *See, e.g.*, Richard Susskind, THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES 27-57 (2008); Ribstein, *supra* note 190, at 771-77.

[194] *See, e.g.*, Dilloff, *supra* note 192, at 352-54; Michelle M. Harner, *The Value of "Thinking Like a Lawyer"*, 70 MD. L. REV. 390, 395-99 (2011); Rhee, *supra* note 192, at 320-26; Ribstein, *supra* note 190, at 768-71.

[195] *See, e.g.*, Steven C. Bennett, *When Will Law Schools Change?*, 89 NEB. L. REV. 87, 108-15 (2010); Robert J. Rhee, *The Madoff Scandal, Market Regulatory Failure and the Business Education of Lawyers*, 35 J. CORP. L. 363, 390-91 (2009); Rhee, *supra* note 192, at 324-26; Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 603-13 (2010); David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2108-09 (2010).

[196] For an illuminating argument that increasing competitive pressures within the legal profession will require law schools to increase their emphasis on the development of professional skills from a leading legal educator, see David E. Van Zandt, *Foundational Competencies: Innovation in Legal Education*, 61 RUTGERS L. REV. 1127 (2009). For a similar argument from a practitioner, see Bennett, *supra* note 195, at 108-28.

[197] Rhee, *supra* note 192, at 311. For a particularly useful discussion of this point, see Clark D. Cunningham, *Should American Law Schools Continue to Graduate Lawyers Whom Clients Consider Worthless?*, 70 MD. L. REV. 499, 501-03 (2011).

[198] Cunningham, *supra* note 197, at 499 (quoting Chester Paul Beach, Assoc. Gen. Counsel of United Techs. Corp.).

Another response to the case for greater skills training is the claim that law schools can reserve skills training for a discrete portion of the curriculum, such as clinical courses, which have emerged in significant part because of the concern that traditional law school curricula fail to impart foundational skills.[199] This puts an enormous burden on clinical courses, however; they must not only teach students how to handle real clients and cases, but also provide the foundational skills not found elsewhere in the curriculum. Even aside from this, there is reason to question how much clinical and experiential education can accomplish. Of necessity, clinical and other experiential education involves relatively unsophisticated, small-stakes litigation and therefore is unlikely to do much to develop the skills that will enable a student to practice at a higher level.[200]

In my years in practice as a government lawyer, for example, I frequently worked with student interns, who were usually assigned quite menial tasks. Delegating such work to student interns was quite convenient for the attorneys but rarely of much use to the students as a means of acquiring the skills necessary to succeed in practice. In this connection, it is worth noting the only study of which I am aware to investigate the matter determined that while 62% of recent law school graduates who had clinical experience during law school found that experience helpful to them in the practice of law, and 58% of those with internships found that experience helpful, 78% found that summer legal employment was helpful, and 67% found that legal employment during the school year was helpful to their success in the practice of law.[201] To be sure, there are many perils in assessing law school education on the basis of surveys of recent graduates, but this data surely calls for some caution in assessing the claim that externships and clinics provide the best training for practice.

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[199] For a useful discussion of the this phenomenon, see Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 71-78 (2009).

[200] *See, e.g.*, Johnson, *supra* note 187, at 1256. For additional discussion of the limitations on clinical legal education, see Rhee, *supra* note 192, at 335.

[201] *See* Sandefur & Selbin, *supra* note 199, at 85 tbl.1.

But there is a more fundamental objection to a model that depends on either post-graduate work or clinical and experiential courses to impart foundational skills. The value of teaching preprofessional students any substantive curriculum that is divorced from the skills necessary to utilize this knowledge in the profession is, at best, obscure. There may be value, for example, in extolling the theoretical virtues of a strong and unitary executive when it comes to national security, especially when compared to an often fractious and indecisive legislature. Nevertheless, our conception of the rule of law is premised on the view that legal rules are not wholly indeterminate and that the law places meaningful constraints on a client.[202] Certainly in our everyday affairs, we do not conceive of the law as so indeterminate that it tolerates virtually anything as long as a lawyer can produce the requisite form of words to bless a client's desired course of action. Accordingly, supplying students with a theoretical or philosophical basis to assess the virtues of a strong executive falls far short of what these students will need to practice law. To become lawyers, students must become adept at the manner by which theory is applied in light of applicable legal constraint. It is the client that needs grounding in history, philosophy, and national security studies in order to develop its own views on national security policy; the lawyer needs a different skill set to reconcile the client's views with applicable legal constraints.

B. The Perils of the Theoretician as Reflected in the Legal Career of John Yoo

The rise of the theoretician in the legal academy means that the current generation of legal scholars is less likely to focus on what the law is than on what the law should be. After all, the decline of the academy's focus on doctrine naturally entails less concern with the details of extant legal regimes. If the academy is increasingly less concerned with doctrine, however, it should be unsurprising that its members have less facility in understanding and applying doctrine.

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[202] For a valuable discussion of this point, see Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987). For applications of this principle to the particular context of the Office of Legal Counsel, see LUBAN, *supra* note 18, at 192-204; and W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 FORDHAM L. REV. 1333, 1356-62 (2009).

Professor Yoo's work in the OLC illustrates the point. Professor Yoo presumably wished to advance the interests of his client, and his acquaintance with political philosophy and the theoretical justifications for a strong executive may have helped to persuade him of the soundness of the client's position.[203] But a deeply felt and well-grounded understanding of the client's objectives is no substitute for facility in the craft of lawyering. Indeed, Professor Yoo's deficiencies as a lawyer may well have originated in his orientation toward theory rather than craft. Theoreticians often lack interest in legal doctrine; many even refuse to take doctrine seriously. In this vein, after leaving government service, Professor Yoo wrote: "[L]aw is not the end of a matter; indeed, it is often the beginning. Sometimes people look to the law as if it were a religion or a fully articulated ethical code that will make these decisions for us, relieving us of the difficult job of making a choice."[204] The role of a practicing lawyer, however, is to ensure that the client's choices can be reconciled with applicable legal restraints; in this task, law is "the end of the matter." Professor Yoo, however, so failed in reconciling his (or his client's) political philosophy with applicable legal constraints that the Bush Administration ultimately concluded that his most important legal work was indefensible.

Indeed, it appears that Professor Yoo was more attached to the concept of a strong executive than his own client; as we have seen, the Bush Administration itself ultimately repudiated an extraordinary number of the positions taken in Professor Yoo's OLC memos. Even as he rejected the Office of Professional Responsibility's finding that Professor Yoo should be subject to professional discipline for his role in the OLC memos relating to the interrogation of suspected terrorists, Associate Deputy Attorney General David Margolis wrote: "I fear that John Yoo's loyalty to his own ideology and convictions clouded his view of his obligation to his client and led him to author opinions that reflected his own extreme, albeit sincerely held, views of executive power while speaking for an institutional client."[205] This is surely a powerful statement on the extent to which the practice of law can be distorted by those who exalt the value of theory and ideology not anchored in professional norms. Among Professor Yoo's victims were his own clients.

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[203] For Professor Yoo's views on the virtues of a strong executive on matters of national security, see JOHN YOO, CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH 401-10 (2009); John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 590-600 (2006); and John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 812-22 (2004).

[204] YOO, *supra* note 9, at xii.

No matter how well versed in the liberal arts or social sciences, lawyers who cannot advance defensible legal positions are of no use to anyone—surely not their clients. As we have seen, whatever the merits of Professor Yoo's legal work during his tenure at the OLC in terms of policy or political philosophy, that work consistently transgressed the norms of craft. This should be unsurprising; as we have also seen, Professor Yoo is typical of the current generation of legal scholars—especially at the highest ranked institutions—whose concerns center on theory and not legal doctrine or practice. Those who find doctrine and the norms of craft to be of subsidiary importance at best are unlikely to be adept at their use.

We should not be surprised that Professor Yoo lacked the requisite skills given the paucity of his own experience with the practice of law prior to joining the OLC. One recent analysis of legal education usefully explicated the relation of theory and practice of law:

> The expert's knowledge is well grounded in subtle, analogical reasoning achieved through a long apprenticeship to more expert practitioners. In this process of learning, formal models and rules play an essential role . . . but the formal models are themselves based on practice. Put another way, in the teaching and learning of expertise, practice is often ahead of theory. Formal knowledge is not the source of expert practice. The reverse is true: expert practice is the source of formal

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[205] Margolis MoD, *supra* note 17, at 67.

> knowledge about practice. Once enacted, skilled performance can be turned into a set of rules and procedures for pedagogical use, as in the cognitive apprenticeship. But the opposite is not possible: the progression from competence to expertise cannot be described as simply a step-by-step build-up of the lower functions. In the world of practice, holism is real and prior to analysis. Theory can—and must—learn from practice.[206]

Or, to put it more simply: "We teach doctrine and policy in our courses, but we should also teach problem solving, which is what lawyers do for their clients."[207]

If there has been a refutation of this view, I have never encountered it. Indeed, Professor Yoo's experience at the OLC illustrates its truth. Whatever the merits of Professor Yoo's view of executive power, he lacked the professional skills necessary to convert that view into a legally defensible position on which his client could rely—the kind of professional skills that are rarely developed except through practical experience. Even a brilliant academic, well versed in theory but lacking practical experience, is all too likely to lack the professional skills necessary to reconcile the client's position with applicable rules of statutory construction or relevant precedent, and for just that reason will lack the ability to impart these skills to students as well.[208] Indeed, it is likely all too easy for an academic to rationalize away his lack of professional skill by claiming that only theory is important—a view that, as we have seen, Professor Yoo appears to embrace. Yet, what Professor Yoo's clients needed is what virtually all clients need – an adept problem-solver. The solutions that Professor Yoo offered to his clients' legal problems, however, proved untenable, as we have seen.

To be sure, one might conclude that even with ample practical experience, Professor Yoo might have permitted a theory of executive power to trump the demands of legal craft. Still, a practitioner schooled in the Darwinian world of representing real clients with real problems inevitably learns that ideology is no substitute for legal craft. Few clients, after all, are looking to hire someone who will provide them with ideologically pleasing but legally untenable advice. Professor Yoo, however, lacked the seasoning that comes with such a Darwinian experience. Beyond that, while practical experience is surely not either a necessary or sufficient condition for success in teaching law, a theoretician is far more likely to lack an adequate appreciation of the norms of professional craft that are central to success in the practice of law. Had Professor Yoo been more engaged with the norms of craft, he would have been far less likely to produce work product so consistently at odds with those norms.

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[206] SULLIVAN ET AL., *supra* note 188, at 118.

[207] William L. Reynolds, *Back to the Future in Law Schools*, 70 MD. L. REV. 451, 458 (2011) (footnote omitted).

[208] For a similar argument, see Newton, *supra* note 179, at 146-48.

Even Professor Yoo's rather modest self-criticism—that he did not anticipate that the Torture Memo would become public and that certain portions of the memo were "susceptible to quotations out of context"[209]—powerfully reflects the limitations of the theoretician. A lawyer with even a modicum of practical experience would understand that leaks are ubiquitous. In my own experience as a government lawyer handling matters far less sensitive than those crossing Deputy Assistant Attorney General Yoo's desk, I learned to assume that all of my work product might find its way into the public realm, regardless of the wishes of the client. Beyond that, it is hard to understand how Professor Yoo could not have expected that his work would eventually become public, if only by virtue of the client's decision to release it. If those subject to the interrogation practices condoned in his memos, for example, were one day placed on trial, or merely given access to the media, there was clearly some likelihood that the interrogation techniques employed on these detainees would become public, which might result in a need to disclose the pertinent OLC memos. At a minimum, Professor Yoo knew that the President he served would not remain in office forever, and a successor might deem it appropriate to release his work product. Professor Yoo's failure to anticipate the release of the memos speaks volumes about his own judgment.[210] Even if one believes that the only reason Professor Yoo's successors in the Bush Administration repudiated so many of his legal positions was because they proved politically untenable, that illustrates the importance of this type of practical judgment. One of the jobs of a government lawyer is to anticipate when legal advice may become public and produce a political backlash that will ultimately harm the interests of the client. Even sound theory that proves politically untenable is ultimately of little use to a governmental client. The conclusion to be drawn, of course, is that theoretical expertise divorced from the practical judgment is of little use in the legal profession. As we have seen, acquiring facility in problem solving is central to the development of sound legal judgment. Professor Yoo's clients needed someone who appreciated that part of the problem to be addressed was to take a legal position that could stand the light of day, which was eventually coming. That practical reality may not have been evident to a theoretician, but an awareness of that reality was essential to sound lawyering under the circumstances.

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[209] YOO, *supra* note 9, at 177.

To be sure, a lawyer is entitled, indeed obligated, to utilize whatever indeterminacy can be found in applicable legal rules to advance the interests of a client. A grounding in philosophy, political science, economics, or other pertinent liberal arts and social sciences, in turn, may well enhance the skill with which a lawyer can utilize such indeterminacy to the benefit of one's client. No doubt Professor Yoo's knowledge of and views on political philosophy contributed mightily to his view of the value of a strong executive. But teaching political philosophy without the skills necessary to reconcile the client's position with applicable legal restraints is not teaching law; it is teaching political philosophy. There is nothing wrong with teaching political philosophy; it is a staple in philosophy and political science programs at both the graduate and undergraduate levels. But in law schools, teaching political philosophy divorced from the skills and constraints of the lawyer is dangerous—profoundly so. Nor is there any clear rationale for having law schools duplicate the work of philosophy and political science departments. If unadorned political philosophy is an appropriate part of legal education, surely it is better to have students register for appropriate courses in political science or philosophy departments than somehow lead them to believe that unadorned political philosophy is an acceptable approach to learning how to practice law.

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[210] As one experienced government official observed of the Torture Memo: "Even though the memorandum was intended for a limited audience, Yoo and Bybee certainly could have foreseen that the memorandum would someday be exposed to a broader audience, and their failure to provide a more balanced analysis of the issues created doubts about the *bona fides* of their conclusions." Margolis MoD, *supra* note 17, at 68.

We do not know how closely Professor Yoo's teaching hews to the approach to his duties that Professor Yoo took at the OLC. Most law professors work diligently to present all sides of legal issues to their students; I assume Professor Yoo does the same. The problem, however, is not that Professor Yoo may be indoctrinating students ideologically, but that his example shows the pitfalls of relying on a theoretician who lacks an adequate appreciation of the virtues of craft and sound professional judgment. It is the theoretician who denigrates the centrality of doctrine and craft who is least likely to recognize when ideology and theory must be subordinated to the demands of legal craft if the client is to be given a defensible legal position. A theoretician who lacks the practical problem-solving skills so central to the craft of lawyering, moreover, is hardly in a position to impart those skills to his students. The problem, of course, is not limited to the training of future government lawyers; some worry that the private sector is coming to be hobbled by the prevalence of lawyers who graduate law school with ample theoretical knowledge but little practical problem-solving ability.[211]

Professor Yoo's experience illustrates the dangers of a theoretician in a profession in which practical experience plays such a central role. Perhaps one can impart preprofessional skills to law students without the knowledge that comes from experience, but Professor Yoo's experience suggests that the skills required to reach the highest ranks of the legal academy have diverged radically from the skills necessary to succeed in the practice of law. There is surely reason to doubt that those who lack the professional judgment necessary to succeed in the practice of law are in a position to begin the process by which their students acquire that very professional judgment. To acknowledge, with Dean Edley, that Professor Yoo was guilty of "bad judgment,"[212] is, in other words, to say that he lacked the skill most critical to success in the legal profession.

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[211] *See, e.g.*, Gillian K. Hadfield, *Equipping the Garage Guys in Law*, 70 MD. L. REV. 484, 487-90 (2011).

C. Academic Freedom and the Legal Theoretician

Then there is the matter of academic freedom and its associated constitutional protections, referenced by Dean Edley in his statement on Professor Yoo's work at the OLC. While there are many formulations of the concept of academic freedom, one constant is that academic freedom functions to promote high-quality scholarship consistent with professional norms for scholarly work rather than protecting those who lack the requisite qualification for teaching within the university.[213] As one recent account put it, academic freedom "is the freedom to pursue the scholarly profession, inside and outside the classroom, according to the norms and standards of that profession."[214] No one, for example, would think that an assessment of the quality of a candidate's teaching or scholarship works an infringement on academic freedom when undertaken in connection with an application for employment, promotion, or tenure. After all, the concept of academic freedom exists to enable the university to pursue excellence, not to protect mediocrity.

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[212] *See supra* text accompanying note 5.

[213] *See, e.g.*, J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 276-79 (1989); Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. REV. 461, 475-80 (2005); David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 241-42 (1990); William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, *in* THE CONCEPT OF ACADEMIC FREEDOM 59, 61-63 (Edmund L. Pincoffs ed., 1975).

[214] MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 149 (2009).

To be sure, Professor Yoo was not acting as a teacher or scholar when working at the OLC. For that reason, one might conclude that academic freedom is entirely inapplicable to his work there. Still, prevailing conceptions of academic freedom generally recognize that it reaches outside the realm of scholarly work, although they recognize as well that with academic freedom comes correlative responsibility, even with respect to nonscholarly work. For example, the 1915 American Association of University Professors' statement on academic freedom, the foundational document when it comes to academic freedom in the United States,[215] explained that "[i]n their extramural utterances, it is obvious that academic teachers are under a peculiar obligation to avoid hasty or unverified or exaggerated statements, and to refrain from intemperate or sensational modes of expression."[216] It also acknowledged the obligation of the academy "to purge its ranks of the incompetent and the unworthy, [and] to prevent the freedom which it claims in the name of science from being used as a shelter for inefficiency, for superficiality, or for uncritical or intemperate partisanship."[217] These principles have remained widely accepted within the academy.[218]

The constitutional conception of academic freedom is a little different. In *Regents of the University of Michigan v. Ewing*,[219] for example, the Court upheld an academic dismissal of a medical student against a due process challenge concluding that academic decisions are immune from constitutional attack absent "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment"[220] and invoking the concept of academic freedom as supporting a university's freedom to make academic decisions free from intrusive judicial review.[221] Thus, academic freedom as a constitutional concept is no protection for the incompetent. To the contrary, it protects the university when it imposes discipline in an effort to preserve academic standards consistent with professional norms of excellence.

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[215] *See, e.g.*, RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 468-506 (1955); Byrne, *supra* note 213, at 276-79; Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1267-85 (1988).

[216] Am. Ass'n of Univ. Professors, *The 1915 Declaration of Principles*, *reprinted in* AM. ASS'N OF UNIV. PROFESSORS, ACADEMIC FREEDOM AND TENURE app.a, at 172 (Louis Joughin ed., 1967).

[217] *Id.* at 170.

[218] For a discussion of the evolution of professional norms with respect to standards of professionalism in particular, see Neil W. Hamilton, *Academic Tradition and the Principles of Professional Conduct*, 27 J.C. & U.L. 609 (2000).

[219] 474 U.S. 214 (1985).

Accordingly, both scholarly and constitutional conceptions of academic freedom offer rights and correlative responsibilities; scholars are expected to conform to professional norms. Thus, any discussion of Professor Yoo's legal work and academic freedom necessarily focuses to the question whether, under the norms that govern preprofessional education, those who lack the skills to practice law at an acceptable level should nevertheless teach the practice of law.

Dean Edley agrees that "Professor Yoo offered bad ideas and even worse advice during his government service."[222] The concept of academic freedom therefore requires inquiry into the question of whether shielding "bad ideas and even worse advice" from academic scrutiny is consistent with relevant preprofessional norms. According to the accrediting authority, "[a] law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession."[223] At a minimum, that ought to mean that the faculty is capable of understanding and conveying to students the ability to provide responsible advice to clients concerning pertinent legal constraints. A teacher charged with conveying the skills necessary to practice law surely ought to be capable of recognizing "bad ideas and even worse advice" before passing them along to his client. One would hope that academic standards for preprofessional education cannot be satisfied by such a performance; certainly that seems to be the view of the accrediting authority. Beyond that, Professor Yoo's work at the OLC is just the kind of shoddy, superficial, and intemperate work for which prevailing norms of academic freedom provide no safe haven.

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[220] *Id.* at 225.

[221] *Id.* at 225-26. I have elsewhere developed a more elaborate account of the First Amendment's conception of academic freedom. *See* Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 96-110 (2008).

[222] Christopher Edley, Jr., *The Torture Memos and Academic Freedom*, Apr. 10, 2008, http://www.law.berkeley.edu/news/2008/edley041008.html. Similarly, although rejecting the OPR's finding that Yoo and Bybee were subject to professional discipline, Associate Deputy Attorney General Margolis concluded that "Yoo and Bybee exercised poor judgment by overstating the certainty of their conclusions and underexposing countervailing arguments." Margolis MoD, *supra* note 17, at 68.

[223] ABA STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS., Standard 301(a) (2009).

Dean Edley doubtless would not worry about the "chilling effect" of a tenure review that would assess the quality of a candidate's scholarship—or even post-tenure review of scholarship, which is required by the pertinent accreditation standards for all faculty members, including those with tenure.[224] The fact that Dean Edley seems averse to any consideration of the quality of a faculty member's legal work at an institution devoted to preparing students for the practice of the law should be distressing. The concept of academic freedom is recognized to foster excellence, not mediocrity or worse. As institutions devoted to preprofessional education, law schools should endeavor to maintain a faculty capable of inculcating excellence in the practice of law, not merely excellence when it comes to producing scholarship. At a minimum, the pertinent accreditation standard requires law schools to concern themselves with the question of whether their faculties are preparing students for the "responsible" practice of law. Such a concern, however, seems absent in Dean Edley's calculus.

D. Professor Yoo and the Current Generation of Legal Scholars

One might react to the preceding by claiming that Professor Yoo is little different from the typical scholar of his generation—especially at the highest ranked schools—who all too often lack practical experience and are for that reason unlikely to be able to convey critical professional skills that are essential to the practice of law. It would be anomalous to concern ourselves only with those academics that enter practice and prove themselves lacking in professional judgment—the upshot of that approach would be to encourage legal scholars to stay in the academic cocoon where their professional deficiencies may not be exposed. Yet, surely any concern along these lines provides no reason to maintain a status quo in which all too many preprofessional educators are likely to lack the kind of professional skills that students should expect in their teachers. The proper course of action is not to ignore the problem that John Yoo represents, but to address it comprehensively.

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[224] *See id.* Standard 404(b).

To be sure, the conclusions offered here can be no more than tentative. Professor Yoo may represent a natural experiment in the legal theoretician suddenly tasked with important professional responsibilities, but he represents a sample of one. One needs little grounding in statistics to agree that the sample size makes any conclusion hazardous. Nevertheless, as we have seen, the emergence of the theoretician in the legal academy has corresponded with growing concerns about the ability of law schools to prepare their students for competent legal practice. There is surely enough smoke to warrant serious discussion and debate, if not yet a declaration that the legal academy is on fire.

It is, moreover, possible to take the position advanced here too far. I do not mean to argue that any academic would replicate Professor Yoo's errors if given the chance.[225] Nor do I mean to suggest that there is no place on law faculties for philosophers, social scientists, or others who may lack competence to practice law, but who can nevertheless make an important contribution to the intellectual growth of law students. It may also be that there are other means by which academics can develop and demonstrate professional judgment other than spending substantial time in practice. Nevertheless, it is critical that law schools understand which of their faculty are capable of teaching students to practice law, and ensure that their own students do not mistake a course in social or political philosophy as providing guidance for representing clients in the practice of law. Judge Posner, for example, has proposed that law schools identify faculty skilled in legal analysis by placing them in an appropriate department, while placing scholars with a primarily interdisciplinary expertise in departments with an interdisciplinary focus.[226] Short of such a reform, however, there is a real problem illustrated by Professor Yoo. The University of California at Berkeley did not label him as competent only in areas unrelated to the practice of law. Indeed, he thought himself competent to practice law and took a position at the OLC doing just that. Yet, he made quite a hash of things. Perhaps Professor Yoo's work did not fall below the standard of minimum competence that would subject him to professional discipline, but surely law schools ought to aspire to something more than simply refraining from employing those who teach because they are not competent to practice law.

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[225] Assistant Attorney General Bybee's successor at the OLC, Jack Goldsmith, had spent most of his career in the academy (although he did have somewhat more pertinent practice experience than Professor Yoo), *see* GOLDSMITH, *supra* note 9, at 17-18, 20-22, and yet, as we have seen, he repudiated the Torture Memo. *See supra* text accompanying notes 174-75.

To be sure, one can argue that the virtues of Professor Yoo and his like as theoreticians outweigh their vices as practitioners. Still, one must ask whether there is an adequate nexus between his virtues and the purpose of legal education. Perhaps Professor Yoo's theoretical grasp of the virtues of a strong executive warrant his employment as a teacher of political philosophy, but they offer little justification for employing him at a law school teaching courses that purport to prepare students for practice. Law schools are, after all, in the business of providing preprofessional education.

I have suggested that central to Professor Yoo's failings as a lawyer is his lack of experience in the practice of law, which limited his ability to develop sound professional judgment. As we have seen, Professor Yoo's lack of experience is more of the rule than the exception, especially at the highest ranked law schools. Professor Yoo's sojourn in practice provides a particularly vivid illustration of the deficiencies of the theoretician as practitioner, but it is hard to tell how widespread the problem that he represents is. Professor Yoo is an unusual case; academics rarely move back into practice, and when they do, they presumably are subject to more exacting supervision than Professor Yoo seems to have received. Professor Yoo may reflect something of a natural experiment in the deficiencies of the legal theoretician as a practitioner of law that is rarely, if ever, replicated. Still, Professor Yoo's example, coupled with the evidence that his lack of professional experience is far from unique among those in the legal academy, suggests that the problem of law professors who have too little familiarity with the type of professional judgment that young lawyers must develop is not rare. It may be that a great many law students receive insufficient instruction in the interaction between theory and practice from teachers who are only theoreticians with little understanding of the interaction of theory and practice. As we have seen, complaints about the quality of professional preparation at law schools among their graduates are prevalent and may, in turn, be explained by the prevalence of the theoretician in legal education.

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[226] *See* Richard A. Posner, *The State of Legal Scholarship Today: A Comment on Schlag*, 97 GEO. L.J. 845, 854-55 (2009).

Whatever the value of creating within the academy repositories for theoretical scholarship unconnected to the practice of law, as we have seen, the vast majority of law students devote considerable time and money to law school on the understanding that they will obtain marketable skills. Surely law schools have some obligation to provide faculties capable of imparting those skills—anything else is a species of consumer fraud. The fact that our leading law schools have on their faculties individuals who claim to be able to teach students to practice law, but in fact cannot provide their own clients with defensible legal advice and may well be incapable of teaching their students how to do so, suggests that something has gone very wrong in the legal academy.

Perhaps it is time for a change.

PLEADING BLINDLY

Ellen S. Podgor[*]

INTRODUCTION

The Department of Justice (DOJ), recently caught with discovery violations that reflect prosecutorial misconduct and prosecutorial improprieties,[1] took the bold and perhaps unprecedented step to issue three new policies.[2] A working group

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[*] Gary R. Trombley Family White-Collar Crime Research Professor and Professor of Law, Stetson University College of Law. The author thanks research assistant Rachel A. Kestenbaum. She also thanks Dean Darby Dickerson and Stetson University College of Law for the financial support provided in the writing of this article.

[1] *See, e.g.,* United States v. Shaygan, 661 F. Supp. 2d 1289, 1318-20 (S.D. Fla. 2009) (finding discovery violations under *Brady, Giglio,* and *Jencks*); Ellen S. Podgor, *DOJ Moves to Dismiss the Ted Stevens Case*, WHITE COLLAR CRIME PROF BLOG, http://lawprofessors.typepad.com/whitecollarcrime_blog/2009/04/doj-moves-to-dismiss-the-ted-stevens-case.html (Apr. 1, 2009) (citing Motion of the United States to Set Aside the Verdict and Dismiss the Indictment with Prejudice, United States v. Stevens, No. 08-231 (EGS) (D.D.C. Apr. 1, 2009)) (discussing dismissal of case by DOJ following discovery violation); *see also* Letter from Hon. Emmet G. Sullivan, U.S. District Judge for D.C., to Hon. Richard C. Tallman, Chair, Judicial Conference Advisory Comm. on the Rules of Criminal Procedure (Apr. 28, 2009), http://lawprofessors.typepad.com/whitecollarcrime_blog/2009/11/change-the-discovery-rules.html (calling for an amendment to Federal Rule of Criminal Procedure 16 for disclosure of all exculpatory material).

[2] *See* Tracy Russo, *Memos to United States Attorneys: Establishing Guidance for Prosecutors Regarding Criminal Discovery*, JUSTICE BLOG, http://blogs.usdoj.gov/blog/archives/493 (Jan. 4, 2010). It should be noted that the DOJ has never affirmatively stated that the issuance of these three policies was a result of recent findings of discovery violations associated with this office, but they do state that it is "in response to some of the recommendations in the Working Group Report." Memorandum from David W. Ogden, Deputy Att'y Gen., on the Requirement for Office Discovery Policies in Criminal Matters for the Heads of Department Litigating Components Handling Criminal Matters (Jan. 4, 2010), http://www.justice.gov/dag/dag-to-usas-component-heads.pdf.

"made up of senior prosecutors from throughout the Department and from United States' Attorney Offices, law enforcement representatives, and information technology professionals" examined the "policies, practices, and training related to criminal case management and discovery"[3] and provided the impetus for then Deputy Attorney General David Ogden's three memos: 1) *Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group*,[4] 2) *Requirement for Office Discovery Policies in Criminal Matters*,[5] and 3) *Guidance for Prosecutors Regarding Criminal Discovery*.[6] While applause is certainly warranted for the government's affirmative recognition that "[t]he Department of Justice's responsibility is not just to win cases, but to do justice,"[7] the policies fall short in an important area—discovery for defendants prior to entering into plea agreements.[8]

This essay considers the three memos of former Deputy Attorney General David W. Ogden with a focus on how these memos consider, and fail to consider, discovery matters in the context of plea negotiations.[9] It also notes the more recent memo of Attorney General Eric H. Holder, Jr. titled *Depart-*

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[3] Russo, *supra* note 2.

[4] Memorandum from David W. Ogden, Deputy Att'y Gen., on Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group for Department Prosecutors (Jan. 4, 2010), http://www.justice.gov/dag/dag-memo.pdf.

[5] Ogden, *supra* note 2.

[6] Memorandum from David W. Ogden, Deputy Att'y Gen., on Guidance for Prosecutors Regarding Criminal Discovery for Department Prosecutors (Jan. 4, 2010), http://www.justice.gov/dag/discovery-guidance.pdf.

[7] Russo, *supra* note 2.

[8] Although this piece is focused on discovery as related to plea agreements, it should be noted that the Ogden Memos fall short in many other areas such as instructing prosecutors that they should never describe their discovery process as "open file," failing to instruct on when *Jencks* material should be given to defense counsel despite varied practices across the United States, and having the DOJ as opposed to courts making the decisions on when evidence should be withheld to protect witnesses or for reasons of national security. *See* Ellen S. Podgor, *New DOJ Discovery Policies Fall Short*, WHITE COLLAR CRIME PROF BLOG, http://lawprofessors.typepad.com/whitecollar crime_blog/2010/01/new-doj-discovery-policies.html (Jan. 5, 2010).

[9] *See infra* notes 32-45 and accompanying text.

ment Policy in Charging and Sentencing[10] that recognizes the existence of plea waivers but then fails to offer guidance on improper waiver provisions.[11] The essay then places this discussion in the backdrop of legal scholarship[12] and existing precedent, most importantly the Supreme Court opinion in *United States v. Ruiz*[13] that provides little support for mandating discovery to defendants prior to entering into a plea agreement.[14] Protecting the importance of "a voluntary and knowing"[15] plea agreement cannot be overlooked in assuring an efficient system of justice. Unique concerns are also noted when the government is entering into a deferred prosecution agreement with a corporation or other entity. This essay concludes by stressing the importance of not accepting prosecutorial guidelines as the answer for achieving discovery material as a part of plea negotiations.[16]

PROSECUTORIAL POLICY

The Department of Justice Guidelines are basically policy, usually located in the United States Attorneys' Manual,[17] that guides United States Attorneys across the country on a variety of procedural and substantive matters.[18] As prosecutors are afforded enormous discretion, these internal guidelines are especially useful to new Assistant United States Attorneys. The guidelines also serve to provide consistency in decision-making as there are ninety-three United States Attorneys located in the United States, Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands.[19] Guidelines are offered for many situations such as providing advice on the factors to be considered in deciding whether to charge a corporation.[20] They designate when approvals will be required,[21] such as for international terrorism matters[22] or consenting to a plea of nolo contendere.[23] In some instances, a particular office will need to be consulted before action can be taken, and the guidelines provide the instructions for the approval process. For example, the guidelines tell prosecutors to send every request for an international extradition to the Office of International Affairs for review and approval.[24]

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[10] *See* Memorandum from Eric H. Holder, Jr., Att'y Gen., on Department Policy on Charging and Sentencing to all Federal Prosecutors (May 19, 2010), http://lawprofessors.typepad.com/files/holdermemo.pdf.

[11] *See infra* note 46 and accompanying text.

[12] *See infra* notes 53-62 and accompanying text.

[13] 536 U.S. 622 (2002).

[14] *See infra* notes 63-74 and accompanying text.

[15] Boykin v. Alabama, 395 U.S. 238, 242 (1969). Federal Rules of Criminal Procedure, Rule 11 provides the procedure for acceptance of a plea and requires that the court determine that the plea is voluntary and that there is a factual basis for the plea. It is necessary that the accused understand "waiver of these trial rights if the court accepts a plea of guilty or nolo contendere." *See* Fed. R. of Crim. Proc., Rule 11 (Supp. 2010).

[16] *See infra* notes 79-81 and accompanying text.

[17] It is described as a looseleaf text that "contains general policies and some procedures relevant to the work of the United States Attorneys' offices and to their relations with the legal divisions, investigative agencies, and other components within the Department of Justice." *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 1-1.100 (2010), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/ [hereinafter U.S. ATTORNEYS' MANUAL].

But the guidelines are not mandatory, and as internal guidelines they are unenforceable at law. The guidelines explicitly provide that "[i]t is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal."[25] The reality is that DOJ guidelines are sometimes ignored, and there is little recourse when this happens.[26]

Despite the failure of prosecutors to always adhere to DOJ guidelines, it is important to note that these guidelines are not always the minimal standards under law. It is common for DOJ guidelines to advise prosecutors to exceed the requirements of the law. For example, there is no legal requirement that a defendant be advised of his or her rights prior to appearing before a grand jury. The DOJ guidelines, however, instruct prosecutors that it is the Department of Justice policy "to advise a grand jury witness of his or her rights if such witness is a 'target' or 'subject' of a grand jury investigation."[27] Likewise, Supreme Court precedent tells a prosecutor that he or she is not required to present exculpatory evidence to a grand jury.[28] The guidelines, however, inform prosecutors otherwise, in that it states:

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[18] *See generally* Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1 (1971) (discussing the importance of the DOJ guidelines).

[19] *See* United States Attorneys' Mission Statement, *available at* http://www.justice.gov/usao/about/mission.html.

[20] U.S. ATTORNEYS' MANUAL, *supra* note 17, § 9-28.300 (2010).

[21] U.S. ATTORNEYS' MANUAL, *supra* note 17, § 9-2.400 (2010).

[22] U.S. ATTORNEYS' MANUAL, *supra* note 17, § 9-2.136(D) (2010).

[23] U.S. ATTORNEYS' MANUAL, *supra* note 17, § 9-16.010 (2010).

[24] U.S. ATTORNEYS' MANUAL, *supra* note 17, § 9-15.210 (2010).

[25] U.S. ATTORNEYS' MANUAL, *supra* note 17, § 1-1.100 (2010).

[26] *See generally* Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 CORNELL J.L. & PUB. POL'Y 167 (2004) (discussing the failure to adhere to DOJ guidelines).

> [i]t is the policy of the Department of Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.[29]

The guidelines recognize the Supreme Court's decision in *United States v. Alvarez-Machain*[30] that allowed a prosecution following the kidnapping of a foreign national in Mexico for trial in the United States.[31] But in citing to this precedent, the guidelines recognize the "sensitivity of abducting defendants from a foreign country" and place restrictions on law enforcement engaging in such conduct.[32]

Historically the memos of the Deputy Attorney General (DAG) have become a part of the culture of the office and serve as added guidance that is offered by each individual DAG who passes through the office. For example, former Deputy Attorney General Ogden's January 4, 2010, Memorandum for Department Prosecutors, *Guidance for Prosecutors Regarding Criminal Discovery*, is included in the Criminal Resource Manual that is referenced in the United States Attorneys' Manual.[33] Some of the memos issued by Deputy Attorney Generals have been controversial and been the subject of court discussions, such as the Thompson memorandum on the *Principles of Federal Prosecution of Business Organizations*.[34]

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[27] U.S. ATTORNEYS' MANUAL, *supra* note 17, § 9-11.151 (2010).

[28] *See* United States v. Williams, 504 U.S. 36 (1992) (holding that it is not within a court's supervisory powers to dismiss an indictment when the government fails to present "substantial exculpatory evidence" to a grand jury).

[29] U.S. ATTORNEYS' MANUAL, *supra* note 17, § 9-11.233 (2010). The guideline also provides that "[w]hile a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review." *Id.*

[30] 504 U.S. 655 (1992).

[31] *Id.*

[32] U.S. ATTORNEYS' MANUAL, *supra* note 17, § 9-15.610 (2010).

Despite the fact that plea agreements represent approximately ninety-five percent of the dispositions in the federal criminal justice system,[35] the Ogden memos fail to offer meaningful consideration of the discovery issues that arise in this context. In the memo titled *Guidance for Prosecutors Regarding Criminal Discovery* (*Guidance for Prosecutors Memo*), there is discussion of "where to look" for the evidence, "what to review," how to conduct the review, and "making a record."[36] Prosecutors are told "to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes."[37] The memo warns prosecutors to be aware of cases with national security issues and to study these matters prior to filing charges.[38] The memo has what might be called a "take-credit when you can" statement, in that it advises prosecutors to let the defense know when they are providing "discovery beyond what is required," while also suggesting that the prosecutor acknowledge that this is not a commitment to provide such additional discovery in the future.[39]

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[33] U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 165 (2010), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.pdf [hereinafter CRIMINAL RESOURCE MANUAL].

[34] *See* United States v. Stein, 541 F.3d 130, 136 (2008) (discussing the role of the Thompson Memo in a company's failure to pay attorney fees of indicted employees).

[35] U.S. Sentencing Commission, Figure C: Guilty Pleas and Trial Rates, Fiscal Years 2005-2009, http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2009/FigC.pdf (2006 - 95.7%; 2007 - 95.8 %; 2008 - 96.3 %; 2009 - 96.3%).

[36] Ogden, *supra* note 6, at 2, 4, 10.

[37] *See id.* at 3.

[38] *Id.*

[39] *Id.* at 9.

Clearly the *Guidance for Prosecutors Memo* stresses the importance of disclosing exculpatory evidence "reasonably promptly after discovery."[40] But when it comes to disclosures prior to pleas, the memo states "[p]rosecutors should be attentive to controlling law in their circuit and district governing disclosure obligations at various stages of litigation, such as pre-trial hearings, guilty pleas, and sentencing."[41] Thus, despite the theme of the Ogden *Guidance for Prosecutors Memo* being to provide discovery to insure a "fair and just result in every case,"[42] the bulk of cases proceeding through these government offices may find themselves outside the discussion because they are resolved with a plea agreement and there is no affirmative statement that all discovery, not just exculpatory material, needs to be turned over to the defense prior to entering a plea agreement.

This *Guidance for Prosecutors Memo* does provide that "[d]iscovery obligations are continuing, and prosecutors should always be alert to developments occurring up to and through trial of the case that may impact their discovery obligations and require disclosure of information that was previously not disclosed."[43] Here again, the focus of the discovery is trial and not resolution of the matter without the necessity of a trial.

The remaining two memos issued in January 2010 by then Deputy Attorney General Ogden provide equally weak language of discovery guidance prior to entering a negotiated plea. The *Memorandum for Heads of Department Litigating Components Handling Criminal Matters* focuses on having individual U.S. Attorney offices throughout the different districts formulate a written discovery policy for their district. This policy recognizes that "[p]roviding broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of the case."[44] But in the next sentence it notes that "there are times when countervailing considerations counsel against broad and early disclosure."[45]

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[40] *Id.* at 10.

[41] *Id.*

[42] *Id.* at 11.

[43] *Id.* at 10.

[44] Ogden, *supra* note 2, at 1.

The final Ogden memo, *Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group,*[46] thanks the Working Group that studied discovery issues in the DOJ. It tells prosecutors that discovery coordinators have now been named and that a "Train the Trainer" conference has been held.[47] This educational approach to resolving problems of the past is an incredible step for improving the discovery issues that have recently plagued DOJ. In this memo, former Deputy Attorney General Ogden acknowledges that "[i]n many cases, broad and early disclosures might lead to a speedy resolution and preserve limited resources for the pursuit of additional cases."[48] But then in the next sentence, this is qualified by a statement that "[i]n other cases, disclosures beyond those required by relevant statutes, rules and policies may risk harm to victims or witnesses, obstruction of justice, or other ramifications contrary to our mission of justice."[49] Throughout the memos one does not find an explicit statement instructing prosecutors to provide discovery prior to entering plea agreements. More importantly, there is no statement prohibiting prosecutors asking for a waiver of discovery in return for the benefit of the bargain being offered by the plea agreement.

The May 19, 2010, *Memorandum to All Federal Prosecutors*[50] issued by Attorney General Eric H. Holder, Jr. recognizes the importance of plea agreements and the effect of waivers, but again, it provides no guidance on the necessity of discovery prior to entry of plea agreements. This memo stresses "individualized assessment" in charging and sentencing decisions.[51] Holder states that "[e]ach office shall promulgate written guidance regarding the standard elements required in its plea agreements, including the waivers of a defendant's rights."[52] This is clearly a step forward in recognizing the importance of plea negotiations, but this memo also fails to provide explicit department policy on what will be allowed and what will be prohibited in this important area of law. One does not find language that discovery waivers to secure a plea bargain are unacceptable.

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[45] *Id.* at 1-2.

[46] Ogden, *supra* note 4, at 1.

[47] *Id.* at 3.

[48] *Id.* at 2.

[49] *Id.*

[50] *See* Holder, *supra* note 10.

[51] *Id.* at 1.

LEGAL SCHOLARS

Many have written about pretrial discovery in cases resolved via a plea negotiation, and most advocate for increased disclosure. Some have commented on the practice of prosecutors to demand waiver of discovery rights as part of a plea negotiation.[53] Questions that can become relevant here are whether the pleas are knowing and voluntary when these rights are waived,[54] and whether the duty to disclose exculpatory evidence to the defendant is a right that can be waived.[55] Clearly there are concerns about the implications to a fair judicial process because of discovery waivers in plea agreements.[56] In addition, ethical concerns arise for the defense, and also for defense counsel, who bears malpractice exposure should unprovided evidence by prosecutors confirm the innocence of the accused. But of the utmost importance, as pointed out by Professor Kevin C. McMunigal, is the fact that non-disclosure of exculpatory or other discovery material raises concerns of wrongful convictions.[57]

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[52] *Id.* at 2.

[53] *See, e.g.,* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2013-14 (2000) (discussing how prosecutors include as a requirement in a plea agreement that the defendant waive discovery rights).

[54] *See* Ellen Yaroshefsky, *Ethics and Plea Bargaining: What's Discovery Got to Do With It?*, 23 CRIM. JUST. 28 (2008) (discussing the ethical obligations of lawyers in the plea bargaining process).

[55] *See* Shane M. Cahill, Note, United States v. Ruiz: *Are Plea Agreements Conditioned on Brady Waivers Unconstitutional?*, 32 GOLDEN GATE U. L. REV. 1 (2002).

[56] *See generally* Erica G. Franklin, Note, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of 'Discovery' Waivers*, 51 STAN. L. REV. 567 (1999) (discussing the policy and ethical implications of waivers).

In the existing scholarship one also finds suggested improvements to achieve a more balanced process by the exchange of discovery prior to finalizing a plea agreement. Academics such as Professor Russell Covey note that "the enhancement of pre-plea discovery would help to conform plea bargain outcomes to trial outcomes and is therefore justified under trial shadow theory."[58] Professor Erica Hashimoto calls for an amendment to the Model Rules of Professional Conduct to require "pre-plea disclosure of exculpatory and impeachment information."[59] The scholarship is not limited to a United States focus, as Professor Jenia Iontcheva Turner, in conducting a comparative study of judicial participation in plea negotiations, notes "that a judge's early input into plea negotiations can render the final disposition more accurate and procedurally just."[60]

The problem of allowing pleas to be entered without the defense having received discovery is magnified when discovery later surfaces and the defendant not only waived rights to receive discovery, but also waived the ability to file post-conviction relief. Prosecutors are offered guidance in the sentencing appeal context of how to word plea agreements to assure that a defendant is unsuccessful with arguments for post-conviction relief.[61] Attorneys Alan Ellis and Todd Bussert note that waivers of a defendant's appellate and post-conviction rights raise ethical concerns of possible ineffective assistance of counsel claims for the defense counsel and concerns of prosecutorial misconduct for the prosecution.[62]

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[57] *See* Kevin C. McMunigal, *Guilty Pleas,* Brady *Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651 (2007) (discussing the failure to disclosure *Brady* material and wrongful convictions); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989) (discussing how the disclosure of *Brady* material advances the accuracy of pleas).

[58] Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 91 (2009). *But see* John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 442 (2001) (discussing "the marriage of *Brady* and plea bargaining" would not achieve "fully informed pleas").

[59] Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 CARDOZO L. REV. 949, 949 (2008) (discussing why an amendment to Rule 3.8(d) of the Model Rules of Professional Conduct is needed to assist with pre-plea disclosures).

[60] Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 199 (2006) (providing a comparison of judicial involvement in pleas between Germany, Florida, and Connecticut).

COURTS

Although the Supreme Court in *United States v. Ruiz*[63] is forceful in stating that defendants have no Fifth and Sixth Amendment right to have federal prosecutors provide "impeachment information relating to any informants or other witnesses,"[64] there is less clarity on the requirements of *Brady*[65] material when a plea negotiation resolves a case. In this regard, courts are split on whether prosecutors can include a waiver of a defendant's discovery rights as part of a plea agreement when the material being withheld is exculpatory as opposed to impeachment evidence.[66]

In *Ruiz*, the Court examined a California "fast track" plea bargain that required defendants "to waive indictment, trial and an appeal" in return for a sentencing recommendation for a downward departure under the federal sentencing guidelines.[67] The proposed plea provided that "information establishing the defendant's factual innocence" had been, and would continue to be, provided to the defendant, but the defendant would be required to "'waive the right' to receive 'impeachment information relating to any informants or other witnesses' as well as the right to receive information supporting any affirmative defense the defendant raises if the case goes to trial."[68] This latter provision, the waiver of the right to impeachment evidence, resulted in a breakdown in the plea negotiation, and when the defendant pleaded guilty without a negotiated agreement, the government did not advocate for a downward sentencing departure.

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[61] CRIMINAL RESOURCE MANUAL, *supra* note 33, § 626 (2010), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00626.

[62] Alan Ellis & Todd Bussert, *Stemming the Tide of Postconviction Waivers*, 25 CRIM. JUSTICE 28 (2010).

[63] 536 U.S. 622 (2002).

[64] *Id.* at 625.

[65] *See* Brady v. Maryland, 373 U.S. 83 (1963) (holding it a due process violation when prosecutors fail to disclose requested material exculpatory evidence).

[66] *See* United States v. Conroy, 567 F.3d 174, 179 (5th Cir. 2009) (failing to extend *Ruiz* to exculpatory evidence), *cert denied*, 130 S. Ct. 1502 (Feb. 22, 2010); McCann v. Mangialardi, 337 F.3d 782, 787-88 (7th Cir. 2003) (extending *Ruiz* to *Brady* disclosures that provide factual innocence).

[67] 536 U.S. at 625.

The *Ruiz* Court noted that "the Constitution does not require the prosecutor to share all useful information with the defendant."[69] The Court found the release of this information "more closely related to the fairness of a trial than to the voluntariness of the plea."[70] With concerns about the "administration of the plea bargaining process," the Court found that it could not say "that the Constitution's due process requirement demands so radical a change in the criminal justice process in order to achieve so comparatively small a constitutional benefit."[71]

But strong arguments can be made that this decision is limited to impeachment evidence and does not extend to discovery of exculpatory evidence. The Court explicitly noted that the proposed plea in the *Ruiz* case stated that the government would provide and continue to provide evidence of factual innocence. The Court found that this provision along with "other guilty-plea safeguards diminishes the force of Ruiz's concern that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty."[72] In this regard, one cannot cite *Ruiz* as supportive of a plea agreement that requires waiver of *Brady* type material.

The *Ruiz* decision can be characterized as promoting efficiency, in that the Court was concerned about a system that would impair quick processing of the "90% or more—of federal criminal cases" that are resolved through a negotiated agreement.[73] The Court noted that it would necessitate "substantially more resources" if the government needed to advance discovery materials to the defense prior to entering into a plea bargain.[74]

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[68] *Id.*

[69] *Id.* at 629.

[70] *Id.* at 633 (emphasis omitted).

[71] *Id.* at 632-33.

[72] *Id.* at 631 (citation omitted).

[73] *Id.* at 632.

Although the use of this form of an economic analysis is disturbing when the context relates to issues of liberty, there are additional factors that support a reconsideration of the *Ruiz* decision. Since the Court's *Ruiz* decision in 2002, government transparency and defense and media exposure of discovery violations have provided some insight into discovery problems existing across the country.

DEFERRED PROSECUTION AGREEMENTS

The pressure to plead is not unique to individuals[75] but is also felt in the corporate world. Following the demise of Arthur Andersen, LLP,[76] deferred prosecution agreements have become a norm in the corporate sector. The resolution of a case may not be a function of the guilt or innocence of a party. Rather, decisions may be more dependent upon the risks and collateral consequences of certain actions.[77] Corporations pay huge fines, agree to cooperate with the government, allow for monitors to participate in company activity, and assure the government that the compliance program at the company is now effective against criminal conduct in order to obtain a deferred or non-prosecution agreement with the government.[78]

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[74] *Id.*

[75] *See generally* Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73 (1995) (discussing the pressures to plea bargain).

[76] The indictment and later conviction of accounting firm Arthur Andersen, LLP, caused the demise of the company. The later Supreme Court decision that reversed this conviction was inconsequential to the company as it had suffered the collateral consequences of being unable to continue its business because of the prosecution. *See* Arthur Andersen, LLP v. United States, 544 U.S. 696 (2005).

[77] *See* Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77 (2010) (discussing how innocence or guilt may not be the determining factors for resolving a criminal matter).

[78] *See generally* Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1 (2007-08) (discussing violations of contract rights as a result of prosecutorial power in reaching deferred prosecution agreements).

Providing pre-deferred prosecution discovery is equally important in this corporate context to equalize the playing field between the government and corporation entity. What is perhaps unique about deferred prosecutions is that the corporation is often anxious to provide reciprocal discovery to the government in order to save the entity. In deferred prosecution agreements, the government will often request the company provide evidence that can be used against individuals within the company who violated the law. Providing the material to the government can serve as the corporation's ticket to remain a viable entity that is not subject to debarment or other collateral consequences that could destroy its business.

CONCLUSION

On April 28, 2009, Hon. Emmet G. Sullivan, the judge who sat on the case of *United States v. Stevens*, wrote a letter to the Hon. Richard C. Tallman, the chair of the Judicial Conference Advisory Committee on the Rules of Criminal Procedure, calling for modifications to Rule 16 to require "disclosure of all exculpatory information to the defense."[79] He noted how the DOJ "strongly opposed the amendment" back in September of 2006 saying that a modification to the United States Attorneys' Manual "would obviate the need for an amendment to the federal rule."[80] A modification was made to the Manual, but as noted by Judge Sullivan, problems continued. With the new *Brady* issues that have arisen in cases such as *United States v. Stevens*,[81] we see the DOJ again trying to placate parties by issuing three new discovery memos and a new memo on charging and sentencing. These memos offer a huge step in correcting injustices that have arisen, but they also fail to appropriately respond to concerns regarding pre-plea discovery.

What the Ogden memos fail to emphasize is that achieving justice takes time and resources. Resting on the laurels of the *Ruiz* decision will not correct the problems inherent in a system that fails to consider the importance of discovery for all defendants within the system, and not just those proceeding to trial. Efficiency may be appropriate when dealing with strict liability offenses that carry minimal consequences. But with ninety-five percent of cases proceeding through a plea agreement, it is important to assure fairness for all defendants, and not just for those contemplating a trial.

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[79] Sullivan, *supra* note 1 (calling for an amendment to Federal Rule of Criminal Procedure 16 for disclosure of all exculpatory material).

[80] *Id.*

[81] *See* Podgor, *supra* note 1.